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Craig P. Goldman

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## RENDER UNTO CAESAR THAT WHICH IS RIGHTFULLY CAESAR'S, BUT NOT A PENNY MORE THAN YOU HAVE TO: SUPPLEMENTAL NEEDS TRUSTS IN MINNESOTA

Craig P. Goldman<sup>†</sup>

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<sup>†</sup> Mr. Goldman is an attorney with the Minneapolis law firm of Maser & Amundson, P.A., practicing in the areas of estate planning, conservatorships, guardianships, disability planning, and probate.

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I. INTRODUCTION

Imagine a young family of five, consisting of a thirty-one-year-old mother, her thirty-three-year-old husband, their twin nine-year-old daughters, and their two-year-old son, who was born with severe Downs' Syndrome. The parents of this family obviously face a host of challenges, many of which will last their entire lifetimes. Among these challenges are issues concerning how to arrange their estate plans to best provide for all their children. Certainly their disabled son will never be able to care for or support himself and will thus require various types of support, financial and otherwise, for the duration of his life rather than the approximately eighteen years required by their other two children. Decisions, such as determin-

ing where their son will live and who will provide the necessary care for him, must be made by someone throughout the course of his life. These issues will not likely prove overly burdensome while the parents are alive and able to care for their son themselves. Upon their deaths, however, the child could be left essentially alone in the world, particularly if his siblings are not in a position, due to their ages, finances or physical proximity, to offer much, if any, assistance to their brother. In such a situation, the child will almost certainly have to rely upon some form of government assistance, placing the child at the mercy of often severe and nearly impoverishing program eligibility requirements.<sup>1</sup> Are there any acceptable options for this family?

Imagine next that a widowed mother of three adult children recently died, leaving a probate estate worth approximately \$500,000. Two of the children are healthy, but one daughter has a history of mental retardation and mental illness. As such, she is unable to support herself and currently receives Medicaid, Supplemental Security Income ("SSI"), housing assistance, and food stamps. Will receipt of her share of her mother's estate disqualify her from continuing to receive any or all of the aforementioned public assistance benefits? If such is the case, can she disclaim her inheritance? If the inheritance cannot be disclaimed, what other options are available to this disabled individual?<sup>2</sup>

It is encouraging to know that several estate planning options do in fact exist for these families, which address all of the pervasive issues raised by these and countless similar situations, namely: (1) how to ensure that the disabled individual becomes, and remains, eligible for necessary governmental assistance; (2) how to avoid forcing the parents of a disabled child to choose between leaving that child his or her share of their estates, which would inevitably be "swallowed up" by medical care costs in a very rapid manner, and disinheriting the child altogether; (3) how to provide care for the disabled individual when family members are no longer able to do so; and (4) how to accomplish all of these goals without unduly restricting the disabled individual's dignity, independence, and potential.<sup>3</sup> Prior to analyzing these various options, a brief examina-

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1. See R. Mark Hochberg, *Providing for Disabled Children (estate planning ideas)*, FIN. WORLD, Nov. 21, 1995, at 94, available in 1995 WL 8083399.

2. See Theresa Varnet, *OBRA Payback Trusts*, EXCEPTIONAL PARENT, Oct. 1996, at 69, available in LEXIS, News Library, CURNWS file.

3. See Robert G. Gunderson, *Supplemental Needs Trusts Under Minnesota Statute*

tion of Medicaid, one of the most commonly-utilized government assistance programs for disabled individuals, is in order.

## II. INTRODUCTION TO MEDICAID

In a nutshell, the Medicaid program<sup>4</sup> is "a jointly financed federal-state program designed to provide health care to needy individuals."<sup>5</sup> Although states are not required in any way to support or participate in the Medicaid program,<sup>6</sup> states which do choose to participate are largely free to develop their own unique standards for determining eligibility for the program.<sup>7</sup> Whatever plan a state develops, however, "must conform with the requirements of the federal statutes and regulations."<sup>8</sup>

For example, participating states are "required to provide Medicaid to 'categorically needy' persons, who are defined as those receiving cash assistance under the aid to families with dependent children (AFDC) program or the supplemental security income (SSI) program."<sup>9</sup> States wishing to expand their programs voluntarily beyond providing benefits to the categorically needy may also opt "to provide Medicaid coverage to, among others, certain blind, aged, or disabled individuals," typically referred to as the "medically needy."<sup>10</sup>

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§ 501B.89, Subd. 2 and 42 U.S.C. 1396p/M.S. § 501B.89, Subd. 3, in MEDICAL ASSISTANCE 1997, § VIII (Minn. State Bar Ass'n Continuing Legal Educ. No. 96-05.11, Jan. 1997).

4. An in-depth discussion or analysis of Medicaid, with its myriad rules and regulations, is well beyond the scope of this Article. Numerous excellent publications, however, are readily available to readers interested in a broader, more extensive dissertation on this topic. In fact, such a review is strongly recommended for practitioners in this area, since an attorney's failure to advise a client on his or her potential eligibility for government benefits arguably could constitute legal malpractice, particularly in the contexts of estate planning and personal injury law. See, e.g., Joel A. Mendler, *Using Trusts for Disabled Clients: Preserving Governmental Benefits*, L.A. B.J., June 1996, at 26, 26-27.

5. *In re Carlisle Trust*, 498 N.W.2d 260, 263 (Minn. Ct. App. 1993).

6. See *id.*; *Himes v. Sullivan*, 779 F. Supp. 258, 259 (W.D.N.Y. 1991), *aff'd mem.*, 956 F.2d 1159 (2d Cir. 1992).

7. See 42 U.S.C. § 1396a(a)(17) (1994); see also *Carlisle Trust*, 498 N.W.2d at 263 (analyzing whether a trust fund is an available asset for purposes of determining beneficiary's eligibility for medical assistance).

8. *Carlisle Trust*, 498 N.W.2d at 263; see also *Schweiker v. Gray Panthers*, 453 U.S. 34, 37 (1981) ("State medicaid plans must comply with requirements imposed by the [Social Security] Act itself and by the Secretary of Health and Human Services.").

9. *Carlisle Trust*, 498 N.W.2d at 263 (citing 42 U.S.C. § 1396a(a)(10)(A)(i) (1994)).

10. *Id.* (citing 42 U.S.C. § 1396a(a)(10)(C) (1994)).

Minnesota's federally-funded Medicaid program, termed "medical assistance," is governed by chapter 256B of Minnesota Statutes.<sup>11</sup> In addition to the required coverage for the categorically needy, "Minnesota has also opted to provide medical assistance benefits for the medically needy."<sup>12</sup> To be eligible for medical assistance in Minnesota, individuals must meet residency requirements,<sup>13</sup> asset requirements,<sup>14</sup> and income requirements.<sup>15</sup> With respect to the asset requirements, however, both Minnesota and federal law agree that only assets "available to the applicant or recipient" are considered when assessing that individual's eligibility to receive medical assistance benefits.<sup>16</sup> Assets which are not "available" to the disabled individual, then, are not counted for purposes of determining medical assistance eligibility.<sup>17</sup> The specific methodology used in Minnesota for assessing an individual's income and assets for purposes of medical assistance eligibility depends on whether the individual is "categorically needy" or "medically needy." For the categorically needy – i.e., those receiving AFDC or SSI benefits – the methodology used is found under section 256.73 of the AFDC program.<sup>18</sup> However, for the medically needy – i.e., those who are aged, blind, or disabled – the methodology is that

11. MINN. STAT. ch. 256B (1996); see also *In re K.S.*, 427 N.W.2d 653, 656 (Minn. 1988); *Carlisle Trust*, 498 N.W.2d at 263.

12. *Carlisle Trust*, 498 N.W.2d at 263; see also MINN. STAT. § 256B.055, subd. 7 (1996).

13. See MINN. STAT. § 256B.056, subd. 1 (1996). Currently, residency is established for medical assistance purposes if the applicant is: (1) physically present in the state; (2) residing voluntarily in the state; and (3) not maintaining another home elsewhere. See *id.* The lack of minimum time for an individual to be in the State of Minnesota in order to qualify for medical assistance benefits has prompted a proposed change in this law adding a 30-day residency requirement. See *id.*; see also Act of Apr. 12, 1996, ch. 451, art. 2, § 8, 1996 Minn. Laws 1300, 1324 (passed but awaiting federal waiver).

14. See MINN. STAT. § 256B.056, subd. 3 (1996). Generally speaking, individuals can have no more than \$3000 in nonexempt assets in order to qualify for medical assistance. A discussion of the various exempt assets and the means by which assets can be transferred or "spent down" in order to qualify an individual for medical assistance is beyond the scope of this Article.

15. See MINN. STAT. § 256B.056, subds. 4-5b (1996). Minnesota's income limits for medical assistance purposes are tied to the income standards applicable to the AFDC program. A detailed discussion of these standards and their exceptions and exemptions is beyond the scope of this Article.

16. *Carlisle Trust*, 498 N.W.2d at 263 (citing 42 U.S.C. § 1396a(a)(17) (1994)); see also *K.S.*, 427 N.W.2d at 658.

17. See 42 U.S.C. § 1396a(a)(17) (1996); *K.S.*, 427 N.W.2d at 658; *Carlisle Trust*, 498 N.W.2d at 263.

18. See MINN. STAT. § 256B.056, subd. 1a (Supp. 1997).

employed by the SSI program.<sup>19</sup>

The question facing the family in the opening paragraph of this Article, then, is what are the available alternatives for providing for their disabled son in the best possible way, while at the same time ensuring his continued eligibility for medical assistance benefits? Assuming their son will not earn any income sufficient to disqualify him from receiving medical assistance benefits, the focus for this family is on the asset limit determination. Specifically, the concern is whether any money transferred by anyone directly to their son, or even to various third parties for the benefit of their son, would be considered "available assets" under either federal or Minnesota medical assistance guidelines, thus potentially disqualifying him from receiving medical assistance benefits. Similarly, the disabled individual in the second scenario in the introduction must be concerned whether the inheritance from her mother will constitute "available assets," thus disqualifying her from receiving, or continuing to receive, governmental assistance of any sort. Certainly, families with the foresight to plan their estates early and carefully are in a vastly superior position *vis-à-vis* those disabled individuals and their families who must deal with these issues after they already have received any assets.

### III. ALTERNATIVES FOR PROVIDING FOR DISABLED FAMILY MEMBERS

Many options exist for providing for disabled family members, not all of which can be discussed thoroughly in one article. What follows, however, is a discussion of the most common, most effective, and least desirable options.

#### A. *Disinheritance*

Perhaps the most uncomplicated alternative for families with disabled family members is simply to disinherit the disabled child altogether and avoid making any transfers of any assets to the child, either during the parents' lives ("inter vivos transfers") or at their deaths ("testamentary transfers"). By doing so, the parents effectively ensure their disabled child's medical assistance eligibility and force the government to provide whatever services are necessary for the child,<sup>20</sup> but at the emotional cost of excluding their son

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19. See *id.*

20. See Hochberg, *supra* note 1, at 94.

from receiving his share of their estates. This cost is too high for many families, since the utter lack of funds designated to enhance the disabled child's quality of life usually creates an uneasy and dissatisfied feeling in the parents.<sup>21</sup> Thus, disinheritance is generally an unattractive, albeit effective, alternative and typically is reserved for only the most severe disabilities where the child is already receiving governmental assistance of some sort.<sup>22</sup>

### B. Gifting

In terms of medical assistance eligibility, the obvious problem with gifting any sums outright to a disabled family member, and the reason why such gifting is generally discouraged under these circumstances, is the fact that any gift worth more than a nominal amount will almost assuredly render the disabled recipient at least temporarily ineligible to receive medical assistance benefits, at least until the asset level is again reduced to the maximum allowable level.<sup>23</sup> Because this is true whether the nature of the gift is either inter vivos or testamentary, parents of a disabled child, or any relative of any disabled family member for that matter, must be aware of inadvertently naming the disabled individual as a beneficiary or remainder beneficiary under a life insurance policy, annuity, or IRA.<sup>24</sup> In short, such outright gifts to a disabled family member are to be avoided either if medical assistance already is being received or if a future need for medical assistance benefits is anticipated.

### C. Transfers to Third Parties to be Used for the Benefit of a Disabled Family Member

A third option for providing for a disabled child or other family member is to transfer assets, usually at death, to a third person, typically a sibling, with instructions that the funds are to be used solely for the benefit of the disabled child. At first glance, this option seems ideally suited to accomplish inexpensively the dual purposes of adequately providing for the disabled child and avoiding

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21. See Alex L. Moschella & Matthew J. Marcus, *Supplemental Needs Trusts: Estate Planning for Families of Children with Disabilities*, MASS. LAW. WKLY., Apr. 15, 1996, at C7.

22. See Hochberg, *supra* note 1, at 94.

23. See Gunderson, *supra* note 3, at 3; see also Moschella & Marcus, *supra* note 21, at C7 (advising against gifting to children).

24. See Gunderson, *supra* note 3, at 3.



the inclusion of these assets as "available assets" for medical assistance eligibility purposes. A closer look, however, reveals several fundamental flaws and uncertainties which typically render this option extremely unadvisable in virtually all circumstances.

First and foremost, there is no legal duty whatsoever for the third party or parties to act in accordance with the transferor's instructions; they are free to dispose of the assets as they see fit. In other words, there is nothing beyond a moral obligation and a faith in the character of the third party to ensure that the third party will honor the transferor's wish that the transferred assets be used for the benefit of the disabled individual.<sup>25</sup> All too often, such faith in family members is simply misplaced.

An argument exists, however, that the transferor's instructions in this regard constitute a "constructive trust" for the benefit of the disabled individual, thus requiring the third person to act in accordance with the transferor's wishes.<sup>26</sup> This "solution," however, fails to remedy the underlying problem, since if such an argument were successful, the assets in the constructive trust would likely be "available assets" of the disabled individual for medical assistance purposes and would have to be "spent down" before the individual would become eligible for medical assistance benefits.<sup>27</sup>

The problems with this third-party transfer option are not limited to the potential malfeasance of unscrupulous individuals. Another significant problem is the fact that any such assets transferred to a third party become part of that third party's marital estate and are thus subject to reduction or depletion in the event of divorce.<sup>28</sup> Even if no divorce occurs, such transferred assets also become a part of the third party's probate estate. Therefore, if the third party dies before either the exhaustion of the transferred assets or the death of the disabled individual, any remaining transferred assets will be distributed to unintended beneficiaries via the third party's estate, rather than to the disabled individual.<sup>29</sup> Of course, a specific devise in the third party's will to the disabled individual of any remaining transferred assets, which could be kept in an account separate from the third party's own assets for ease of admini-

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25. See *id.* at 4; see also Moschella & Marcus, *supra* note 21, at C7 (advising against leaving funds to a third party such as a brother or sister of the disabled child).

26. See Gunderson, *supra* note 3, at 4.

27. See *id.*

28. See *id.*

29. See *id.*

stration, could remedy this problem. Nevertheless, there is simply no legal obligation whatsoever on the part of the third party to do so. Finally, any assets transferred to a third party for the benefit of a disabled individual are attachable by the creditors of that third party in the event of extreme financial hardship.<sup>30</sup> Thus, the possibility that unforeseen circumstances such as these may thwart the transferor's intentions generally discourages individuals from making such transfers to third parties for the benefit of a disabled family member.

#### *D. Transfers into a Trust with a Disabled Individual as Beneficiary*

The final option for parents wishing to provide for their disabled child or other family member while ensuring that he or she remains eligible for medical assistance benefits is to transfer assets into a trust instrument, with the disabled child as the beneficiary, constructed so as to comply with the extensive state, Medicaid, and SSI rules pertaining to trusts. It is trust instruments such as these upon which the balance of this Article will focus.

### IV. USE OF TRUSTS WITHIN THE FEDERAL SYSTEM: OBRA '93 TRUSTS

#### *A. Generally*

On October 1, 1993, title 42 of the United States Code, section 1396p(d) became effective.<sup>31</sup> This section, in part, identifies certain types of trusts into which disabled individuals, or persons or entities acting on behalf of such disabled individuals, could place assets which would not be counted as "available assets" of the disabled individual for purposes of determining Medicaid eligibility.<sup>32</sup> These trusts, discussed in detail below, are commonly labeled "OBRA '93 trusts."

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30. *See id.*; *see also* Moschella & Marcus, *supra* note 21, at C7 (advising against leaving funds to a third party).

31. Omnibus Budget Reconciliation Act of 1993 § 13611(b), 42 U.S.C. § 1396p(d) (1994). This statute is commonly referred to as "OBRA '93."

32. Trusts such as these are frequently referred to, by practitioners and laypersons alike, as "supplemental needs trusts" in a generic sense. As discussed in this Article, however, such a generic use of the phrase "supplemental needs trusts" is a misnomer, since not all trusts authorized under OBRA '93 meet the unique requirements of true "supplemental needs trusts."

## B. OBRA '93 Trusts as "Available Assets" to Disabled Individuals

### 1. Definitional Requirements

It is self-evident that an individual must be "disabled" in order to receive Medicaid benefits and thus for these estate planning vehicles to be beneficial. The question thus becomes what the term "disability" means under Medicaid. For purposes of Medicaid eligibility,

[a]n individual shall be considered to be disabled . . . if he is unable to engage in any substantial activity by reason of any medically-determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months [or, in the case of a child under the age of 18, if he suffers from any medically-determinable physical or mental impairment of comparable severity].<sup>33</sup>

As previously noted, the critical question to answer when considering the establishment of an OBRA '93 trust for the benefit of a disabled individual is whether the assets contained in that trust will be considered "available assets" for purposes of medical assistance. If so, the trust would be of no benefit to the disabled individual (or the grantor, for that matter) and should not be created. An important definition used in determining whether trust assets will be "available assets" of a disabled individual, for purposes of either OBRA '93 trusts or classic supplemental needs trusts, is that of the actual "assets of the individual." The "assets of the individual" are measured in the following manner:

The term "assets," with respect to an individual, includes all income and resources of the individual and of the individual's spouse, including any income or resources which the individual or such individual's spouse is entitled to but does not receive because of action –

- (A) by the individual or such individual's spouse;
- (B) by a person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or such individual's spouse; or
- (C) by any person, including any court or administrative body, acting at the direction or upon the request of

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33. 42 U.S.C. § 1382c(a)(3)(A) (1994).

the individual or such individual's spouse.<sup>34</sup>

It is important to note that "assets of the individual" may be used to fund OBRA '93 trusts, but may *not* be used to fund supplemental needs trusts, as discussed below,<sup>35</sup> which are generally funded by the disabled individual's family members.<sup>36</sup> This is one of the primary differences between OBRA '93 trusts and supplemental needs trusts, and must be taken into account when deciding which particular trust instrument best meets a disabled individual's specific needs and circumstances.

Also of importance in determining the "availability" of the assets in a disabled individual's OBRA '93 trust is whether or not the trust was "established by the individual" (i.e., "self-settled"). If so, the assets are much more likely to be "available" than if the trust were not self-settled:

For purposes of [OBRA '93], an individual shall be considered to have established a trust [that is, the trust was "self-settled"] if assets of the individual were used to form all or part of the corpus of the trust and if any of the following individuals established such trust other than by will:

- (i) The individual.
- (ii) The individual's spouse.
- (iii) A person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse.
- (iv) A person, including any court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.<sup>37</sup>

In light of these definitions, special care must be taken to determine whether a proposed trust will be "self-settled" and whether it will contain "assets of the individual." Drafting and/or funding errors at this stage could render the trust instrument useless and its

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34. *Id.* § 1396p(e)(1); see also Jeffrey G. Abrandt & Randye Retkin, *The Non-Traditional Family: Planning for the Elderly and Those with a Life-Threatening Illness*, 242 PLI/EST. 405, 441 (Dec. 1995) (discussing OBRA '93 and self-settled trusts).

35. See *infra* Part V.

36. See MINN. STAT. § 501B.89, subd. 2 (1996) (stating that supplemental needs trusts must be "funded by someone other than the trust beneficiary").

37. 42 U.S.C. § 1396p(d)(2)(A) (1994); see also Abrandt & Retkin, *supra* note 34, at 441 (discussing OBRA '93 and self-settled trusts and availability of assets).

assets available to Medicaid.

## 2. *Revocability vs. Irrevocability*

Because of the powers retained by the beneficiary and/or given to the trustee, a revocable trust is considered an "available asset" for Medicaid eligibility purposes.<sup>38</sup> Moreover, payments from revocable trusts to anyone other than the disabled beneficiary are considered "asset transfers" and are thus subject to all Medicaid transfer rules and penalties, including potential criminal penalties for both clients and attorneys alike.<sup>39</sup>

Irrevocable trusts, on the other hand, may or may not be considered "available assets" of the disabled beneficiary, depending on the specific terms of each trust. As a general rule, the assets of an irrevocable self-settled trust are considered "available" to a disabled individual to the extent that any principal or income of the trust is paid or payable to the disabled individual or his or her spouse.<sup>40</sup> In fact, with the exception of the OBRA '93 trusts discussed below in Part IV.C, if the trustee has any authority at all to distribute *any portion* of the principal of the trust, the *entire trust principal* will be considered available, whether or not the trustee actually exercised that discretion.<sup>41</sup> Accordingly, irrevocable trusts must be established in accordance with the OBRA '93 trust rules set forth in Part IV.C below, thus avoiding having the trust assets deemed "available" for medical assistance eligibility purposes.

## 3. *Implications of OBRA '93 Trusts for the Transferor*

General Medicaid rules state that any transfers by individuals to any type of trust, regardless of whether the trust is revocable or irrevocable, are subject to asset transfer rules and ineligibility penalties if the transferor should apply for Medicaid during the mandatory look-back period.<sup>42</sup> There are, however, exceptions to these

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38. See 42 U.S.C. § 1396p(d)(3)(A) (1994).

39. See *id.*; see also Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, § 217, 110 Stat. 2008 (amending section 1128B(a) of the Social Security Act, 42 U.S.C. § 1320a-7b(a)) (effective January 1, 1997) (regarding criminal penalties for certain asset transfers).

40. See 42 U.S.C. § 1396p(d)(3)(B) (1994).

41. See *id.* § 1396p(d)(2)(C).

42. See *id.* § 1396p(c)(1)(B)(i). The term "look-back period" refers to the length of time Medicaid "looks back" from the date of the individual's Medicaid application to scrutinize all asset transfers made by the applicant for purposes of determining the applicant's Medicaid eligibility date. See Richard S. Thwaites, Jr.,

rules which permit transfers into trusts *whose sole beneficiaries are disabled individuals* without the transferor incurring any transfer penalties or period of Medicaid ineligibility.<sup>43</sup> These, of course, are OBRA '93 trusts. Pending legislation in Minnesota, however, would require the remainder of such a trust, upon the disabled beneficiary's death, to revert to the state, in an amount not to exceed the total amount of medical assistance benefits paid to the beneficiary, and also would limit the potential beneficiaries of such trusts to be only the transferor's disabled children.<sup>44</sup>

#### 4. Federal and State Agency Policies

While there have been no significant federal or state statutes, rules, or binding regulations specifically addressing the "availability" of trust assets to a disabled beneficiary for medical assistance eligibility purposes since the enactment of OBRA '93,<sup>45</sup> federal and state policies do exist to provide a measure of guidance on this issue. For example, the Social Security Administration records its policy interpretations of federal regulations in the Program Operations Manual System ("POMS"). While the POMS "is relied upon in making eligibility determinations for [medical assistance], . . . it does not have any legal force."<sup>46</sup> The applicable POMS section provides that a trust "is *not* a resource (i.e., an "available asset") to [an individual] who is not legally empowered to revoke the trust and use the principal for his/her own support and maintenance"<sup>47</sup> or who "cannot direct the use of the trust principal for his/her support and maintenance under the terms of the trust, whether the trust is created with the applicant's own funds or someone else's funds for the benefit of the applicant."<sup>48</sup> Moreover, distributions of "like-kind income" which do not result in the disabled beneficiary's *direct receipt of basic needs*, such as food, clothing and shelter, are not

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*When Assets Are Not an Asset*, 1996 A.L.I.-A.B.A. 467, 472.

43. See 42 U.S.C. § 1396p(c)(2)(B)(iii)-(iv) (1994).

44. See MINN. STAT. § 256B.0595, subd. 4(a)3 (1996) (awaiting federal waiver).

45. See, e.g., *Miller v. Ibarra*, 746 F. Supp. 19, 26 (D. Colo. 1990) (addressing lack of recent applicable federal statutes, rules, or regulations); *In re Carlisle Trust*, 498 N.W.2d 260, 263-64 (Minn. Ct. App. 1993).

46. *Carlisle Trust*, 498 N.W.2d at 264; see also *Whaley v. Schweiker*, 663 F.2d 871, 873 (9th Cir. 1981).

47. Program Operations Manual System Supplement SI § R01120.200(c) (emphasis added); see also *Carlisle Trust*, 498 N.W.2d at 264.

48. *Mendler*, *supra* note 4, at 27 (citing Program Operations Manual Systems SI § 01120.200D 1.a. (July 1990)).

counted as "available assets."<sup>49</sup>

The Minnesota Department of Human Services has also issued a certification manual of its own, containing "policy guidelines to interpret the statutes and rules pertaining to the [medical assistance] program. This manual is advisory and is not a formal rule of law."<sup>50</sup> Like the POMS, Minnesota's certification manual indicates that so long as the beneficiary's access to trust assets is "restricted," the trust assets are "unavailable" for medical assistance purposes.<sup>51</sup> "Restricted access" means that only the trustee or a court has the power to withdraw funds from the principal of the trust.<sup>52</sup>

### 5. *Minnesota Case Law on "Availability" of Trust Assets*

In determining whether a trust is an "available asset" for medical assistance purposes, Minnesota case law seems to focus on two relevant factors: (1) the type of trust involved; and (2) the settlor's intent in creating the trust.<sup>53</sup>

#### a. *Type of Trust*

Simply put, the most common types of trusts found in medical assistance cases are support trusts and discretionary trusts.<sup>54</sup> "Support trusts" restrict the trustee to distributing so much of the income or principal of the trust as the trustee deems necessary only for the "health, support and maintenance" of the disabled beneficiary.<sup>55</sup> "Discretionary trusts," on the other hand, provide the trustee with the unfettered discretion to distribute so much of the income or principal of the trust as the trustee sees fit for any reason; there is no restriction or requirement whatsoever that the funds be used for the support or maintenance of the disabled beneficiary.<sup>56</sup>

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49. See *id.* (citing Program Operations Manual System SI § 01120.200E (Aug. 1990)).

50. *Carlisle Trust*, 498 N.W.2d at 264; see also *Doe v. Minnesota Dep't of Pub. Welfare*, 257 N.W.2d 816, 819 (Minn. 1977); MDHS Combined Manual § 15.6.6, MA Method B.3 (1991).

51. See MDHS Combined Manual § 15.6.6, MA Method B.3.

52. See *Carlisle Trust*, 498 N.W.2d at 264.

53. See *id.*

54. See *id.* (citing *Chenot v. Bordeleau*, 561 A.2d 891, 893 (R.I. 1989)).

55. See *McNiff v. Olmsted County Welfare Dep't*, 287 Minn. 40, 43, 176 N.W.2d 888, 891 (1970); *Carlisle Trust*, 498 N.W.2d at 264; RESTATEMENT (SECOND) OF TRUSTS § 154 (1959).

56. See *Carlisle Trust*, 498 N.W.2d at 264; RESTATEMENT (SECOND) OF TRUSTS §

Because the disabled beneficiary of a support trust can legally compel the trustee to distribute trust assets to him or her, courts typically construe support trusts as "available assets" for medical assistance eligibility purposes,<sup>57</sup> while discretionary trusts, which do not grant the disabled beneficiary such power, are not generally considered "available assets."<sup>58</sup>

*b. Settlor's Intent*

The settlor's specific intent in creating the trust is the second factor that Minnesota courts analyze when determining whether the assets of a trust are "available assets" for medical assistance purposes.<sup>59</sup> If the trust specifically evidences an intent on the part of the settlor that the trust assets are to be used to *supplement*, rather than *supplant*, any available or potentially available governmental assistance, the trust likely will not be counted as an "available asset" for purposes of determining medical assistance eligibility.<sup>60</sup> This position is bolstered by the public policy that

settlers attempting to provide for a handicapped person should not be required to either bankrupt estates or leave the disadvantaged party to the vagaries of public assistance programs. Additionally, . . . courts have not been willing to find that trust assets are available resources for medical assistance purposes when to do so would authorize a rapid and total dissipation of a trust estate intended to provide only supplementary benefits.<sup>61</sup>

Thus, in cases involving a discretionary trust containing a clear indication of the settlor's intent that the trust assets be used to supplement the disabled beneficiary's medical assistance benefits, courts consistently hold that such trusts should not be construed as "available assets" for purposes of determining the disabled beneficiary's medical assistance eligibility.<sup>62</sup>

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155 (1959).

57. See *Chenot*, 561 A.2d at 894; RESTATEMENT (SECOND) OF TRUSTS § 128 cmt. e (1959); Gunderson, *supra* note 3, at 5.

58. See *Chenot*, 561 A.2d at 894; RESTATEMENT (SECOND) OF TRUSTS § 128 cmt. e (1959); Gunderson, *supra* note 3, at 5.

59. See *McNiff*, 287 Minn. at 43, 176 N.W.2d at 891; *Carlisle Trust*, 498 N.W.2d at 265.

60. See *Carlisle Trust*, 498 N.W.2d at 265 (citing *Trust Co. of Okla. v. Oklahoma Dep't of Human Servs.*, 825 P.2d 1295, 1303 (Okla. 1991)).

61. See *id.* (citing *Trust Co. of Okla.*, 825 P.2d at 1303).

62. See, e.g., *Zeoli v. Commissioner of Soc. Servs.*, 425 A.2d 553, 559 (Conn. 1979); *Carlisle Trust*, 498 N.W.2d at 265-66; *Lineback ex rel. Hutchens v. Stout*, 339



## 6. Court Supervision

Court supervision of OBRA '93 trusts is not generally required, but unique circumstances occasionally do present themselves, warranting either court approval or supervision. For example, if the court must approve a proposed settlement in a lawsuit involving a disabled or incapacitated party, it should also approve the OBRA '93 trust, if any, into which the settlement proceeds will be placed.<sup>63</sup> In addition, court approval is required in situations involving transfers by guardians or conservators into an OBRA '93 trust on behalf of a disabled ward or conservatee.<sup>64</sup> Finally, some courts may require the OBRA '93 trust to operate under the continuing jurisdiction of the court and/or require bonding of the trustee and the filing of annual accounts with the court.<sup>65</sup>

### C. Types of Medicaid Qualifying Trusts: "OBRA Trusts"

Prior to the enactment of OBRA '93, a disabled individual, or the disabled individual's spouse, could create a "medical assistance qualifying trust":

[U]nder the terms of [a medical assistance qualifying trust,] the person receives or could receive payments from the trust principal or income and the trustee has discretion in making payments to the person from the trust principal or income. Notwithstanding that definition, a medical assistance qualifying trust does not include: (1) a trust set up by will; (2) a trust set up before April 7, 1986, solely to benefit a person with mental retardation living in an intermediate care facility for persons with mental retardation; or (3) a trust set up by a person with payments made by the Social Security Administration pursuant to the United States Supreme Court decision in *Sullivan v. Zebley*. The maximum amount of payments that a trustee of a medical assistance qualifying trust may make to a person under the terms of the trust is considered to be available assets to the person, without regard to whether the trustee actually makes the maximum payments to the person and without regard to the purpose for which the medical assistance qualifying trust was established.<sup>66</sup>

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S.E.2d 103, 108 (N.C. Ct. App. 1986); *Trust Co. of Okla.*, 825 P.2d at 1302-04.

63. See Gunderson, *supra* note 3, at 20.

64. See *id.*

65. See *id.* at 21.

66. *Id.* (citations omitted).

As discussed above, however, for purposes of Medicaid eligibility following the enactment of OBRA '93, "self-settled trusts," which would include a medical assistance qualifying trust, are generally considered "available assets."<sup>67</sup> Despite this general proposition, OBRA '93 promulgated new trust rules governing the eligibility of trusts for Medicaid purposes.<sup>68</sup> The impact of OBRA '93 in most cases was to disqualify the trusts by closing many of the loopholes<sup>69</sup> which had in the past permitted transfers to various types of trusts while preserving medical assistance eligibility.<sup>70</sup> At the same time, however, OBRA '93 provided for three types of trusts that would still qualify for Medicaid eligibility under the revised system.<sup>71</sup>

### 1. Under 65 Disability Trust

Subsection (A) of section 1396p(d)(4), carving out the first exception to the Medicaid disqualifying rules, often is referred to as the "Under 65 Disability Trust" section.<sup>72</sup> For a trust to qualify as

67. See Abrandt & Retkin, *supra* note 34, at 441.

68. See 42 U.S.C. § 1396p(d) (1994); see also Varnet, *supra* note 2, at 69 (regarding OBRA '93 payback trusts).

69. See Mendler, *supra* note 4, at 27. Among the loopholes closed by OBRA '93 was the ability to disclaim an inheritance, a provision of critical importance to the second family discussed in the introduction to this Article. See Varnet, *supra* note 2, at 69; see also David Ross Okrent, *New York Enacts OBRA '93 Medicaid Law*, C.P.A. J., Apr. 1, 1995, at 56, 57.

70. See Mendler, *supra* note 4, at 27. Generally speaking, inter-vivos transfers to trusts from the assets of disabled individuals by either the individuals, their spouses, their legal representatives, or courts are counted as "available assets" for Medicaid eligibility purposes if there are any circumstances, including exercise of the trustee's discretion, under which any payments from the trust could be made to, or for the benefit of, the disabled beneficiary. See 42 U.S.C. § 1396p(d)(2)(A) (1994).

71. See 42 U.S.C. § 1396p(d)(4)(A)-(C) (1994); see also Aaron L. Danzig & Walter Feldesman, *New Strength for "Moretti" and Other Developments Affecting Self-Settled Trusts*, N.Y. L.J., June 10, 1994, at 1 (discussing three types of self-settled trusts qualifying for Medicaid assistance).

72. See Danzig & Feldesman, *supra* note 71, at 1. This subsection reads: A trust containing the assets of an individual under age 65 who is disabled (as defined in section 1382c(a)(3) of this title) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter.

42 U.S.C. § 1396p(d)(4)(A). Section 1382c(a)(3) defines a disabled individual as follows:

An individual shall be considered to be disabled for purposes of this subchapter if he is unable to engage in any substantial gainful activity by

an "Under 65 Disability Trust," several requirements must be met. First, the trust must be created by a parent, grandparent, or legal guardian of the disabled beneficiary or by a court; the trust absolutely cannot be created by the disabled individual himself or herself.<sup>73</sup> Second, it is self-evident that the beneficiary of the trust must be under the age of 65 and disabled for the trust to qualify as an "Under 65 Disability Trust."<sup>74</sup> Finally, there must be a provision in the trust instrument for recovery by the state of any medical assistance benefits paid on behalf of the disabled beneficiary upon his or her death.<sup>75</sup> If these requirements are met, the "Under 65 Disability Trust" will avert disqualification of the disabled beneficiary from Medicaid eligibility based upon the rules promulgated in OBRA '93.

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reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months (or, in the case of a child under the age of 18, if he or [the child] suffers from any medically determinable physical or mental impairment of comparable severity).

42 U.S.C. § 1382c(a)(3)(A) (1994); see also Joseph Kelner & Robert S. Kelner, *Supplemental Needs Trusts in Personal Injury Suits*, N.Y. L.J., Apr. 26, 1994, at 3 (analyzing the effects of supplemental needs trusts in a personal injury suit).

73. See 42 U.S.C. § 1396p(d)(4)(A); Danzig & Feldesman, *supra* note 71, at 1.

74. See 42 U.S.C. § 1396p(d)(4)(A); Danzig & Feldesman, *supra* note 71, at 1. Amounts may be added to an "Under 65 Disability Trust" until the disabled beneficiary reaches age 65 without losing Medicaid eligibility, but any asset added after the disabled beneficiary turns age 65 will be counted as an "available asset." See David Goldfarb & Nancy R. Stone, *Supplemental Needs Trusts for Disabled Persons*, N.Y. ST. B.J., July-Aug. 1995, at 32, 33-34; Mendler, *supra* note 4, at 27; see also HCFA State Medicaid Manual § 3259.7.A, at 3-3-109.31 (Transmittal No. 64, Nov. 1994).

75. See 42 U.S.C. § 1396p(d)(4)(A); Danzig & Feldesman, *supra* note 71, at 4. Trusts containing this requirement are often termed "payback trusts." See Goldfarb & Stone, *supra* note 74, at 33. The Health Care Financing Administration ("HCFA") has stated that

any pay-back trust where the state's claim is satisfied before any other disbursements are made will be considered an exception to the rule that a trust must be 'for the sole benefit' of a disabled individual in order to be exempt from transfer penalties. Therefore, there should be no problem with having remaindermen in a pay-back trust. However, where a third[-]party trust (not a pay-back trust) is used the grantor may face a transfer penalty or waiting period for his or her own Medicaid eligibility unless the trust is "for the sole benefit" of the disabled individual, that is, no other individual or entity "can benefit from the assets transferred in any way, whether at the time of the transfer or at any time in the future."

Goldfarb & Stone, *supra* note 74, at 34 (quoting HCFA State Medicaid Manual § 3257.B.6, at 3-3-109.2 (Transmittal No. 64, Nov. 1994)).

It is important to note that assets contained in "Under 65 Disability Trusts," with the exception of the payback remainder interest, are *completely* exempt from Medicaid eligibility consideration. In other words,

it appears that both the income and the corpus of the trust can be used during the beneficiary's lifetime with full trustee discretion for the benefit of the disabled person . . . . Such a trust would be ideal for a [grantor] who is not concerned about the remainder and [is] prepared to have a trustee use up most or all of the corpus for the beneficiary.<sup>76</sup>

This fact clearly represents a tremendous opportunity for grantors with disabled family members meeting the requirements of an "Under 65 Disability Trust," and as a result, these trusts are extremely popular.

## 2. Social Security Trusts

Subsection (B) of section 1396p(d)(4) provides that trusts comprised solely of "pension, Social Security, and other income to the individual (and accumulated interest in the trust)" will not disqualify a disabled individual from receiving medical assistance benefits, provided that the state receives all amounts remaining in the trust at the death of the disabled beneficiary up to the total amount of medical assistance benefits paid by the state on behalf of the disabled beneficiary.<sup>77</sup> Because of the particular makeup of the medical assistance rules in Minnesota, however, this provision is of no assistance to disabled individuals or their families wishing to set up an OBRA '93 trust in Minnesota.<sup>78</sup>

## 3. Pooled Asset Trusts

Subsection (C) of section 1396p(d)(4) deals with self-settled "pooled asset trusts," another exception to OBRA '93's general disfavor of self-settled trusts.<sup>79</sup> A "pooled asset trust," or "pooled

76. Abrandt & Retkin, *supra* note 34, at 442.

77. 42 U.S.C. § 1396p(d)(4)(B)(i) (1994); *see also* Sullivan v. Zebley, 493 U.S. 521, 541 (1990) (permitting funding of trust with Social Security back-payments).

78. *See* Gunderson, *supra* note 3, at 19. A detailed discussion of the Minnesota medical assistance provisions making "Subsection B trusts" inapplicable in Minnesota is beyond the scope of this Article.

79. 42 U.S.C. § 1396p(d)(4)(C) (1994).

trust," is a mechanism whereby disabled individuals or persons acting on their behalf can deposit assets, often those received via personal injury or malpractice lawsuit awards and settlements, into a trust system or "pool" established and managed by a nonprofit organization which holds each beneficiary's assets in a separate sub-account.<sup>80</sup> Assets contained in such a trust will not disqualify a disabled individual from receiving medical assistance benefits.<sup>81</sup> Pooled asset trusts function in a similar manner to traditional supplemental needs trusts, as discussed in Part V below. Specifically,

public benefits being maintained [i.e., medical assistance benefits] provide basic support and medical care, while the trust "fills in the gaps." Individual beneficiaries do not have the ability to withdraw their funds from the trust, nor to control any distributions; accordingly, these assets are not considered to be "available" resources so as to disqualify the individual for SSI or Medicaid.<sup>82</sup>

Pooled asset trusts offer a number of unique benefits for disabled individuals and their families. For example, unlike trusts es-

80. *See id.* The entire subsection reads as follows:

(4) This subsection [disqualifying trusts for medical assistance purposes] shall not apply to any of the following trusts:

.....

(C) A trust containing the assets of an individual who is disabled (as defined in section 1382c(a)(3) of this title) that meets the following conditions:

(i) The trust is established and managed by a non-profit association.

(ii) A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts.

(iii) Accounts in the trust are established solely for the benefit of individuals who are disabled (as defined in section 1382c(a)(3) of this title) by the parent, grandparent, or legal guardian of such individuals, by such individuals, or by a court.

(iv) To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan under this subchapter.

*Id.*; *see also* Mendler, *supra* note 4, at 27-28; Mary Catherine Rabbitt & R. Eric Solem, *The Colorado Fund for People With Disabilities: A Pooled Trust*, 25 COLO. LAW., Oct. 1996, at 83.

81. *See* Abrandt & Retkin, *supra* note 34, at 442; Okrent, *supra* note 69, at 57; Rabbitt & Solem, *supra* note 80, at 83.

82. Rabbitt & Solem, *supra* note 80, at 83 (citing 42 U.S.C. § 1396a(a)(17)); *see also* Abrandt & Retkin, *supra* note 34, at 441-42; Okrent, *supra* note 69, at 57.

tablished pursuant to subsection (A) and supplemental needs trusts, subsection (C) pooled asset trusts allow disabled individuals to place their own assets into a pooled trust.<sup>83</sup> Moreover, while subsection (C) requires the beneficiary to be disabled, it does *not* contain any requirement that the disabled individual be under age 65 such as that contained in subsection (A); persons of all ages can avail themselves of this type of trust.<sup>84</sup> A pooled asset trust is the only method under current law for disabled individuals over the age of 65 to place their own assets into trust without disqualifying themselves from receiving medical assistance benefits, a second clear benefit over general supplemental needs trusts.<sup>85</sup>

Pooled asset trusts are also the only trusts allowed under OBRA '93 which do not absolutely require that the state be reimbursed upon the death of the disabled beneficiary for any medical assistance benefits paid to the beneficiary during his or her life.<sup>86</sup> The amount remaining in the disabled beneficiary's sub-account upon death may instead be used for a charitable purpose.<sup>87</sup> Any amounts not so used, however, must be reimbursed to the state up to the amount of medical assistance benefits paid.<sup>88</sup> The charitable remainder provision results in the beneficiary being unable to appoint a remainder-person to receive any surplus assets upon death.<sup>89</sup> This is a very small price given the substantial benefits that

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83. See Abrandt & Retkin, *supra* note 34, at 441-42; Danzig & Feldesman, *supra* note 71, at 4; Okrent, *supra* note 69, at 56-57; Rabbitt & Solem, *supra* note 80, at 83.

84. See Danzig & Feldesman, *supra* note 71, at 4; Mendler, *supra* note 4, at 28. It does appear, however, that pooled asset trusts must be established before the disabled beneficiary reaches age 65 in order to avoid the "transfer of asset" rules set forth in 42 U.S.C. § 1396c, which impose a 36-month ineligibility period. See Mendler, *supra* note 4, at 28 n.17; see also HCFA State Medicaid Manual §§ 3259.7.B, 3258.10(B) (Transmittal No. 64, Nov. 1994).

85. See Okrent, *supra* note 69, at 57-58; Rabbitt & Solem, *supra* note 80, at 83.

86. See Okrent, *supra* note 69, at 56-57; Rabbitt & Solem, *supra* note 80, at 83.

87. See Okrent, *supra* note 69, at 56-57; Rabbitt & Solem, *supra* note 80, at 83. For example, in Article XI of the Colorado Fund for People with Disabilities' ("CFPD") Declaration of Trust, the fund provides that amounts remaining in a beneficiary's account upon death are to be retained by the fund and may be used, in the trustee's sole discretion, for the benefit of other beneficiaries, to add new, indigent beneficiaries, or to provide indigent persons with suitable medical equipment, medications or services. See Rabbitt & Solem, *supra* note 80, at 83 n.14.

88. See Okrent, *supra* note 69, at 56-57.

89. See *id.*

pooled asset trusts bestow and the likely size of the amount that would have to be reimbursed to the state upon the beneficiary's death were the charitable remainder provision not in place.<sup>90</sup> Accordingly, pooled asset trusts, in states where they can be found, are an invaluable resource to individuals meeting the trust's unique circumstantial requirements.<sup>91</sup>

#### 4. *Supplemental Needs Trusts*

"Supplemental needs trusts," as their name implies, are designed to provide benefits to a disabled individual which supplement, but do not supplant, government entitlements for which the disabled individual might otherwise be eligible.<sup>92</sup> In other words, as discussed above, assets which are "available" to a disabled individual must be virtually exhausted before governmental expenditures for the benefit of the disabled individual will be made, but assets in trust which are earmarked for supplemental needs only are not considered "available" because they are not "assets of the individual," and thus will not disqualify a disabled individual from receiving medical assistance benefits.<sup>93</sup>

Supplemental needs trusts also can assist the elderly parents of children with disabilities, a group often overlooked in these situations. Elderly parents of children with disabilities must consider the likelihood of needing some form of medical assistance benefits

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90. One other potential problem with a pooled assets trust, albeit a remote one, is found in *In re Siegel*, 645 N.Y.S.2d 999 (App. Div. 1996). The existing trustees in *Siegel*, all family members of the disabled beneficiary, no longer wished the administrative responsibilities of managing the trust and petitioned for permission to appoint a special guardian to transfer the trust assets into a pooled asset trust. *Id.* at 1001. The court was forced to deny the petition, however, because the original trust agreement did not reserve authority in the trustees to make such a total transfer of assets. Without such authority, the trustees would need the consent of all remainder beneficiaries of the original trust to the transfer, which was not obtained prior to the petition. *Id.* Such consent was required since the remainder beneficiaries would lose their rights under the original trust in the event of the transfer to a pooled asset trust. *Id.* The court dismissed the petition without prejudice, however, recognizing that the remainder beneficiaries were all charities and likely would consent to the transfer. *Id.* at 1003-04. The difficulty experienced by the petitioners in *Siegel* was simply a problem in drafting and would not likely pose a problem for the careful trust drafter.

91. Only a few nonprofit organizations in Minnesota, including the Association for Retarded Citizens ("ARC"), have established pooled asset trusts.

92. See Hochberg, *supra* note 1, at 94; see also David P. Callahan, *Estate Planning for Disabled and Incapacitated Persons*, 248 PLI/EST. 147, 153 (Sept. 1996).

93. See Callahan, *supra* note 92, at 153.

of their own to pay for anticipated nursing home care, in addition to those benefits received by their disabled child.<sup>94</sup> While the disabled child likely has no assets or income of his or her own which would result in disqualification from medical assistance, such is not likely the case for the parents, since one or both of them may have maintained gainful employment for decades. These parents may have substantial saved assets, as well as a sizable income from a pension or IRA, rendering them ineligible for medical assistance benefits yet unable to freely transfer their assets to anyone under Medicaid's transfer prohibitions.<sup>95</sup> At the same time, however, their resources are not likely sufficient simultaneously to provide adequate private medical care for themselves and their disabled child.<sup>96</sup>

Supplemental needs trusts, however, are an exception to the Medicaid transfer prohibitions, allowing these parents to establish such a trust for the sole benefit of their disabled child, who must be under age 65 at the time the trust is established and funded by the parents' "available" assets.<sup>97</sup> Transfers to such trusts will neither delay nor disqualify the parents from becoming eligible for government assistance and will also obviously provide a mechanism for the supplemental needs of their disabled child, a tremendous dual benefit.<sup>98</sup> Because supplemental needs trusts are capable of satisfying both the child's and the parents' needs, they present an option which all individuals in comparable circumstances should consider. Consequently, the remainder of this article is devoted to an in-depth discussion of supplemental needs trusts, with particular focus on Minnesota law, including the benefits of supplemental needs trusts, as well as their eligibility requirements, limitations, and certain drafting concerns for the practitioner.

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94. See Moschella & Marcus, *supra* note 21, at C7.

95. See *id.*

96. See *id.*

97. See *id.*; Varnet, *supra* note 2, at 69.

98. See Varnet, *supra* note 2, at 69.



## V. USE OF TRUSTS WITHIN THE MINNESOTA SYSTEM: SUPPLEMENTAL NEEDS TRUSTS

### A. General Requirements

The supplemental needs trust is essentially a refinement of the "discretionary trust" discussed above,<sup>99</sup> which by its terms specifically limits a trustee's discretion with respect to distributions from the trust in order to meet the needs of the disabled beneficiary not provided for by governmentally-funded programs.<sup>100</sup> A proper supplemental needs trust provides that the purpose of the trust is

to improve upon the beneficiary's quality of life by providing for those supplemental needs, such as more sophisticated medical, rehabilitative, recreational or educational aid, not provided by other sources of assistance, including governmental assistance. The trustee's distribution discretion is limited to considering all other funds available to meet the beneficiary's needs, including governmental assistance. The trustee is prohibited from making distributions for basic support provided under governmental assistance programs. Therefore, a [supplemental needs trust] should not be counted under the asset test for Medicaid, but actual income distributions from the trust will be counted under the income test.<sup>101</sup>

With respect to specific trust provisions, it is advisable to reference the disabled beneficiary's specific disability expressly in the trust to ensure that the trust is in compliance with all applicable medical assistance disability definitions.<sup>102</sup> In a proper supplemental needs trust, the disabled beneficiary *must not* have the power either to revoke or terminate the trust.<sup>103</sup> It is also critical that the trust clearly state the fact that the beneficiary is not *entitled* to any distribution from the trust whatsoever, meaning that the benefi-

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99. See *supra* notes 54-58 and accompanying text.

100. See generally Abrandt & Retkin, *supra* note 34, at 436-40 (describing the operation of supplemental needs trusts and OBRA '93 trust exemptions).

101. Mendler, *supra* note 4, at 28 (citing Hecker v. Stark County Soc. Servs., 527 N.W.2d 226, *on reh'g*, 1995-1 Medicare & Medicaid Guide (CCH) ¶ 43,465 (N.D. 1994); Young v. Ohio Dep't of Human Servs., 1995 Ohio App. LEXIS 1521 (Ohio Ct. App. March 30, 1995); State *ex rel.* Dep't of Human Servs. v. Trust Co. of Okla., 890 P.2d 1342 (Okla. 1995)).

102. See Gunderson, *supra* note 3, at 22. Appendix A, *infra*, sets forth a typical supplemental needs trust.

103. See *id.* at 5.

ary has no access to, or control over, the trust assets.<sup>104</sup> The trust instrument must also unambiguously instruct the trustee that distributions may be made, in the trustee's sole and absolute discretion, only for items not paid for by government benefit programs and which would not disqualify the beneficiary from publicly-funded benefits.<sup>105</sup> "[D]istributions from the trust paid directly to care providers for items deemed necessities (food, clothing, shelter or medical care) are considered 'in-kind' income to the disabled individual" and are counted as "available assets" of the disabled individual for medical assistance eligibility purposes.<sup>106</sup> "Distributions paid directly to providers for 'non-necessities' ( . . . education, entertainment, vacations, etc.), however, are not considered income" or "available assets" because they are not "received" by the disabled individual.<sup>107</sup> Further examples of permissible "non-necessity" expenditures include educational or vocational programs, social or recreational opportunities, art or music lessons and supplies, a private room, and a computer or television.<sup>108</sup>

The trust should also give the trustee the authority to nominate a conservator or guardian of the person and/or the estate of the disabled individual,<sup>109</sup> as well as the ability to satisfy the beneficiary's last bills and funeral expenses upon his or her death. Finally, the trust should contain an "escape clause," providing that the trust shall terminate and the proceeds shall be distributed outright to someone other than the disabled individual if the continued existence of the trust would disqualify the beneficiary from receiving medical assistance benefits or benefits from other publicly-funded programs.<sup>110</sup>

Despite the benefits of supplemental needs trusts, however, courts have shown clear indications that they will not hesitate to invalidate such trusts if they do not strictly comply with the requirements of a proper supplemental needs trust. For example, in *In re*

104. See Gunderson, *supra* note 3, at 5; Moschella & Marcus, *supra* note 21, at C7.

105. See *infra* Appendix A § 3.1.3.

106. *Id.*

107. *Id.*; see also HCFA State Medicaid Manual § 3257.B.6, at 3-3-109.36 (Transmittal No. 64, Nov. 1994).

108. See Gunderson, *supra* note 3, at 5-6.

109. It is extremely ill-advised for a trustee also to serve as a disabled individual's guardian or conservator and vice versa, since such an arrangement arguably could result in the trust assets being considered "available assets." See 42 U.S.C. § 1396p(e)(1) (1994).

110. See Gunderson, *supra* note 3, at 6; see also *infra* Appendix A § 3.1.6.2.

*Morales*,<sup>111</sup> the New York Supreme Court denied a petitioner's application to establish a supplemental needs trust for her son, based upon a host of deficiencies in the proposed trust.<sup>112</sup> Some of the more significant drafting errors consisted of the following: language regarding the trust's irrevocability; the trustee's distribution discretion; the specification of certain items for which expenditures could be made; provisions authorizing employment of legal and financial counsel; the trust's remainder provisions; the trustee's resignation and discharge provisions; the trustee's investment authority; the lack of required trustee accountings to the court; trustee liability provisions; bond requirements; provisions attempting to insulate trust assets from creditors; and the continuing jurisdiction of the court.<sup>113</sup> In so holding, the *Morales* court took notice of its own inherent power as well, stating:

While compliance with all . . . statutory qualifying criteria is mandatory, the existence of such criteria should not be construed as obviating any additional controls which may be required by the court. "[T]he regulations promulgated by the State are for the protection of its own remainder interest, whereas the court is primarily concerned with the protection of the disabled person and likewise to assure the fulfillment of fiduciary obligations." Thus, the court, in granting approval of a supplemental needs trust, may condition such grant on the deletion of inappropriate trust provisions and the inclusion of certain additional trust provisions which it deems necessary to sufficiently protect the interests of the disabled person.<sup>114</sup>

Additionally, "as a guide to the bar," the *Morales* court set forth a model supplemental needs trust which meets all necessary criteria under New York law.<sup>115</sup>

Finally, there is some debate regarding whether an "Under 65 Disability Trust" or a pooled asset trust, such as those discussed in Part IV.C above, should contain "supplemental needs" language limiting the trustee's discretion to providing for the needs of the

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111. 1995 WL 469523 (N.Y. Sup. Ct. July 25, 1995).

112. *Id.* at \*2-\*5.

113. *Id.*

114. *Id.* at \*1 (citation omitted) (quoting *In re Goldblatt*, 618 N.Y.S.2d 959, 961 (Sup. Ct. 1995)).

115. See *id.* at \*6-\*9. While the sample supplemental needs trust provided by the *Morales* court (reproduced *infra* as Appendix B) is premised on New York law, it is nonetheless beneficial to practitioners of all jurisdictions as an example of how to address various specific concerns.

disabled individual not provided by governmentally-funded programs. It is almost certain that no such limitations on the trustee's distribution discretion are necessary to qualify Under 65 Disability Trusts or pooled asset trusts for medical assistance, since these trusts are statutorily exempted from being considered "available assets."<sup>116</sup> On the other hand, if no such limiting language were included, trust assets could conceivably be used to purchase a luxury home, an extravagant vacation, or to pay excessive guardianship fees,<sup>117</sup> a clear abuse of the medical assistance process which could potentially spur harsh regulations from the Legislature on these and other types of trusts. Accordingly *all* trusts, inter vivos and testamentary, created by or for the benefit of a disabled individual, should contain "supplemental needs" language, thus ensuring that the disabled beneficiary will not be declared ineligible for medical assistance benefits.<sup>118</sup>

## B. Minnesota's Supplemental Needs Trust Statute

### 1. Generally

In Minnesota, the treatment of all types of trusts for medical assistance eligibility purposes is governed by statute.<sup>119</sup> Specifically, supplemental needs trusts are governed by their own statute and are intended to supplement the government aid (typically medical assistance benefits) individuals, usually disabled children or elderly family members, receive because of their poor health and lack of resources to pay for their own care.<sup>120</sup> Disabled trust beneficiaries in Minnesota have the burden of proving that the trust is not an "available asset" for purposes of medical assistance.<sup>121</sup> In addition,

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116. See 42 U.S.C. § 1396p(d)(4) (1994).

117. See Mendler, *supra* note 4, at 28.

118. It is worth noting that the mandatory estate recovery rules contained in section 1396p(b) will not likely apply to a supplemental needs trust created by the parents of a disabled child and funded with the parents' assets, so long as the child is only an income beneficiary and other persons are specifically designated as principal beneficiaries. Under these circumstances, the disabled child's interest is not a probate asset of the disabled child. See 42 U.S.C. § 1396p(b)(1) (1994); Mendler, *supra* note 4, at 29.

119. See MINN. STAT. § 256B.056, subd. 3b (1996).

120. See *id.* § 501B.89. See generally Gunderson, *supra* note 3 (providing analysis of supplemental needs trusts under Minnesota law).

121. See MINN. R. 9505.0060, subpt. 3(A) (1991); see also *In re K.S.*, 427 N.W.2d 653, 658-60 (Minn. 1988); *In re Carlisle Trust*, 498 N.W.2d 260, 263 (Minn. Ct. App. 1993).

principal and income from the supplemental needs trust is distributed, at the sole discretion of the trustee, with express directions that distributions are limited to supplementing any aid received or able to be received from governmental assistance.<sup>122</sup> Provided that such a trust complies with the requirements set forth in section 501B.89 of Minnesota Statutes, the trust assets will be "unavailable" for purposes of medical assistance eligibility determinations.<sup>123</sup>

In 1992, Minnesota law with respect to medical assistance treatment of trusts provided: "A provision in a trust created after July 1, 1992, purporting to make assets or income unavailable to a beneficiary if the beneficiary applies for or is determined eligible for public assistance or a public health care program is unenforceable."<sup>124</sup> This statute was based on the concept that "the grantor has the obligation to pay for their [sic] own needs and for the needs of their [sic] spouse and therefore the grantor should not be allowed to establish a trust which [contains] assets which are not 'available' and would not need to be spent down."<sup>125</sup> This statute was arguably so broad, however, that it inadvertently eliminated the enforceability of supplemental needs-type trusts in addition to the grantor trusts it intended to prohibit.<sup>126</sup> Since 1992, the statute has been amended on two occasions to reflect more accurately Minnesota's recognition and strong support of valid supplemental needs trusts.

*a. Subdivision 1*

In 1993, the 1992 version of section 501B.89 was incorporated almost verbatim into subdivision 1 of the current statute, which reads:

(a) Except as allowed by subdivision 2 or 3, a provision in a trust that provides for the suspension, termination, limitation, or diversion of the principal, income or beneficial interest of a beneficiary if the beneficiary applies for, is determined eligible for, or receives public assistance or benefits under a public health care program is unenforceable as against the public policy of this state, without regard to the irrevocability of the trust or the purpose for

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122. See Gunderson, *supra* note 3, at 10.

123. See *id.*; see also *Carlisle Trust*, 498 N.W.2d at 263.

124. MINN. STAT. § 501B.89 (1992) (amended 1993).

125. Gunderson, *supra* note 3, at 9.

126. *Id.*

which the trust was created.

(b) This subdivision applies to trust provisions created after July 1, 1992. For purposes of this section, a trust provision is created on the date of execution of the first instrument that contains the provision, even though the trust provision is later amended or reformed or the trust is not funded until a later date.<sup>127</sup>

Thus, subdivision 1 now prohibits grantor trusts for purposes of medical assistance eligibility, with the explicit exception, however, of valid supplemental needs trusts created pursuant to subdivisions 2 or 3.

*b. Subdivision 2*

Subdivision 2 of section 501B.89 was added in 1993 in response to the concerns surrounding the scope of the original statute. It now specifically sets forth Minnesota's statutory supplemental needs trust law.<sup>128</sup> This subdivision reads:

(a) It is the public policy of this state to enforce supplemental needs trusts as provided in this subdivision.

(b) For purposes of this subdivision, a "supplemental needs trust" is a trust created for the benefit of a person with a disability and funded by someone other than the trust beneficiary, the beneficiary's spouse, or anyone obligated to pay any sum for damages or any other purpose to or for the benefit of the trust beneficiary under the terms of a settlement agreement or judgment.

(c) For purposes of this subdivision, a "person with a disability" means a person who, prior to creation of a trust which otherwise qualifies as a supplemental needs trust for the person's benefit:

(1) is considered to be a person with a disability under the disability criteria specified in Title II or Title XVI of the Social Security Act; or

(2) has a physical or mental illness or condition which, in the expected natural course of the illness or condition, either prior to or following creation of the trust, to a reasonable degree of medical certainty, is expected to:

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127. MINN. STAT. § 501B.89, subd. 1 (1996).

128. See Gunderson, *supra* note 3, at 9.

- (i) last for a continuous period of 12 months or more; and
- (ii) substantially impair the person's ability to provide for the person's care or custody.

Disability may be established conclusively for purposes of this subdivision by the written opinion of a licensed professional who is qualified to diagnose the illness or condition, confirmed by the written opinion of a second licensed professional who is qualified to diagnose the illness or condition.

(d) The general purpose of a supplemental needs trust must be to provide for the reasonable living expenses and other basic needs of a person with a disability when benefits from publicly funded benefit programs are not sufficient to provide adequately for those needs. Subject to the restrictions contained in this paragraph, a supplemental needs trust may authorize distributions to provide for all or any portion of the reasonable living expenses of the beneficiary. A supplemental needs trust may allow or require distributions only in ways and for purposes that supplement or complement the benefits available under medical assistance, Minnesota supplemental aid, and other publicly funded benefit programs for disabled persons. A supplemental needs trust must contain provisions that prohibit disbursements that would have the effect of replacing, reducing, or substituting for publicly funded benefits otherwise available to the beneficiary or rendering the beneficiary ineligible for publicly funded benefits.

(e) A supplemental needs trust is not enforceable if the trust beneficiary becomes a patient or resident after age 64 in a state institution or nursing facility for six months or more and, due to the beneficiary's medical need for care in an institutional setting, there is no reasonable expectation that the beneficiary will ever be discharged from the institution or facility. For purposes of this paragraph, "reasonable expectation" means that the beneficiary's attending physician has certified that the expectation is reasonable. For purposes of this paragraph, a beneficiary participating in a group residential program is not deemed to be a patient or resident in a state institution or nursing facility.

(f) The trust income and assets of a supplemental needs trust are considered available to the beneficiary for medi-

cal assistance purposes to the extent they are considered available to the beneficiary under medical assistance, supplemental security income, or aid to families with dependent children methodology, whichever is used to determine the beneficiary's eligibility for medical assistance. For other public assistance programs established or administered under state law, assets and income will be considered available to the beneficiary in accordance with the methodology applicable to the program.

(g) Nothing in this subdivision requires submission of a supplemental needs trust to a court for interpretation or enforcement.

(h) Paragraphs (a) to (g) apply to supplemental needs trusts whenever created, but the limitations and restrictions in paragraphs (c) to (g) apply only to trusts created after June 30, 1993.<sup>129</sup>

Subsection (b) of subdivision 2 sets forth the actual statutory definition of "supplemental needs trust."<sup>130</sup> Perhaps the most noteworthy aspect of this definition is the provision stating that persons "obligated to pay any sum for damages or any other purpose to or for the benefit of the trust beneficiary under the terms of a settlement agreement or judgment" cannot fund a valid Minnesota statutory supplemental needs trust.<sup>131</sup> In other words, recipients of personal injury or medical malpractice lawsuit judgments or settlement proceeds cannot place those proceeds in a subdivision 2 supplemental needs trust and have them deemed "unavailable" for medical assistance eligibility purposes.<sup>132</sup> The only option in situations such as this is to establish some type of OBRA '93 payback trust such as the "Under 65 Disability Trust" or the pooled asset trust discussed previously.<sup>133</sup>

Subsection (c) defines who is a "person with a disability" for whom a valid subdivision 2 supplemental needs trust may be established.<sup>134</sup> The statute sets forth two methods for determining if an

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129. MINN. STAT. § 501B.89, subd. 2 (1996).

130. *See id.* subd. 2(b).

131. *Id.* This provision does not apply, however, to Social Security back-payments received pursuant to the United States Supreme Court ruling in *Sullivan v. Zebley*, 493 U.S. 521 (1990). These amounts may be used to fund a valid subdivision 2 supplemental needs trust. *See* MINN. STAT. § 501B.89, subd. 2; Gunderson, *supra* note 3, at 12-13.

132. *See* Gunderson, *supra* note 3, at 11.

133. *See supra* notes 72-91 and accompanying text.

134. *See* MINN. STAT. § 501B.89, subd. 2(c) (1996).



individual is a "person with a disability." First, a person meets the requirements of subdivision 2(c) if, prior to the establishment of the trust, he or she is considered disabled under either the Medicaid or SSI methodologies.<sup>135</sup> Second, an individual may satisfy the disability requirements of subdivision 2 if he or she has a physical or mental condition which either has lasted or is expected to last 12 months or more *and* which substantially impairs the individual's ability to care for himself or herself.<sup>136</sup> Additionally, an individual may conclusively qualify as "disabled" under subdivision 2 if he or she provides written opinions from two licensed professional persons confirming the disability.<sup>137</sup> While the statute does not expressly require licensed professional persons' written findings, securing such is highly recommended to safeguard against problems which may arise from disabilities which may be difficult to ascertain.

Subsection (d) sets forth the general requirements for valid supplemental needs trusts, similar to those discussed above.<sup>138</sup> It is important to take notice of the lack of any "payback" provision in the statute, meaning that upon the death of the disabled beneficiary, the remainder of the trust assets may be distributed to whomever the grantor designates. The trust should also very clearly delineate the trustee's powers, making sure those powers are consistent with the limitations contained in subdivision 2.<sup>139</sup>

Subsection (e) reiterates the legislature's steadfast intention that subdivision 2 supplemental needs trusts not be available for persons over age 65 who are in nursing homes.<sup>140</sup> Subsequent rulings by the HCFA have stated that such trusts may continue beyond the time when the beneficiary turns age 65, but no additional assets may be added to the trust beyond that time without being counted as "available assets."<sup>141</sup>

Subsection (f) indicates that the federal methodologies will henceforth be used to determine whether assets in a subdivision 2 supplemental needs trust will be considered "available assets" for

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135. See *id.* subd. 2(c)(1); Gunderson, *supra* note 3, at 11.

136. See MINN. STAT. § 501B.89, subd. 2(c)(2); Gunderson, *supra* note 3, at 11.

137. See MINN. STAT. § 501B.89, subd. 2.

138. See *id.* subd. 2(d); see also *supra* Part V.A.

139. See *infra* Appendix A §§ 5.3-5.3.24 for sample trustee powers.

140. See MINN. STAT. § 501B.89, subd. 2(e).

141. See Gunderson, *supra* note 3, at 12-13.

purposes of federal medical assistance programs.<sup>142</sup> Currently, assets contained in a supplemental needs trust which meets the requirements of section 501B.89 are *not* "available assets" for purposes of any of the federal medical assistance programs. Finally, pursuant to subsection (g), court approval is not required for a subdivision 2 supplemental needs trust to be valid.<sup>143</sup>

*c. Subdivision 3: Supplemental Needs Trusts Under Federal Law*

The Minnesota Legislature added subdivision 3 to section 501B.89 in 1995, in order to expressly authorize the use of supplemental needs trusts pursuant to OBRA '93.<sup>144</sup> Subdivision 3 reads:

A trust created on or after August 11, 1993, which qualifies as a supplemental needs trust for a person with a disability under United States Code, title 42, section 1396p(c)(2)(B)(iv) or 1396p(d), as amended by section 13611(b) of the Omnibus Budget Reconciliation Act of 1993, Public Law Number 103-66, commonly known as OBRA 1993, is enforceable, and the courts of this state may authorize creation and funding of a trust which so qualifies.<sup>145</sup>

*2. Minnesota Supplemental Needs Trust Case Law*

*a. McNiff v. Olmsted County Welfare Department*

Minnesota has not always approved of supplemental needs trusts. In 1970, the Minnesota Supreme Court heard the state's appeal from a district court's order reversing a decision of the commissioner of public welfare. The commissioner had affirmed the cancellation of an invalid widow's medical assistance grant.<sup>146</sup> From September 1966 through August 1967, Medicaid paid for Ms. McNiff's nursing home care costs.<sup>147</sup> On September 1, 1967, her benefits were canceled abruptly when the Olmsted County Welfare Department learned that Ms. McNiff's deceased husband's will placed approximately \$22,000 in a trust which was to benefit both

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142. See MINN. STAT. § 501B.89, subd. 2(f).

143. See *id.* subd. 2(g).

144. See *id.* subd. 3; see also 42 U.S.C. § 1396p(d)(4) (1994) (identifying trust situations that do not preclude the receipt of medical assistance benefits).

145. MINN. STAT. § 501B.89, subd. 3 (1996).

146. See *McNiff v. Olmsted County Welfare Dep't*, 287 Minn. 40, 176 N.W.2d 888 (1970).

147. See *id.* at 41-42, 176 N.W.2d at 890.

Ms. McNiff and her twenty-eight-year-old mentally retarded daughter.<sup>148</sup> The district court reversed this determination, finding that Ms. McNiff never in fact acquired an interest in the trust assets.<sup>149</sup> The court rationalized its decision by focusing upon the basis of "the discretionary nature of the trust, under which . . . the trustee could in his discretion totally exclude [Ms. McNiff] from receiving any benefits of the trust."<sup>150</sup> The supreme court disagreed and reinstated the disqualification determination, stating:

[W]e deem it not the intention of the testator to grant the trustee discretion to apply income or principal in favor of one beneficiary to the total exclusion of the other unless alternative means of support were available. The instrument requires that the trustee provide "for the maintenance, care, support and education of *both* my wife and my said daughter."<sup>151</sup>

Ms. McNiff argued that, contrary to the state's position, "alternative means of support" were indeed available to her, namely medical assistance.<sup>152</sup> Again the supreme court disagreed, stating:

[T]his contention implies that the testator intended his widow to be a public charge. It is not proper to say that the testator wanted the benevolence of the state to be used as the vehicle for preserving the trust estate for the benefit of his daughter. . . . We cannot in good conscience hold that a testator may place assets in a discretionary trust of the type present in the instant case and thereby remove such assets from consideration when the resources of a beneficiary are being determined for purposes of receiving medical assistance.<sup>153</sup>

b. *In re Carlisle Trust*

In 1993, the Minnesota Court of Appeals addressed a disabled individual's appeal from the lower court's determination that his trust fund was an "available asset" for purposes of determining his eligibility for medical assistance.<sup>154</sup> Mr. Carlisle was a fifty-six-year-old man with severe cerebral palsy, who lived with his parents until

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148. *See id.*

149. *See id.* at 42, 176 N.W.2d at 891.

150. *Id.*

151. *Id.*

152. *McNiff*, 287 Minn. at 42, 176 N.W.2d at 891.

153. *Id.* at 42-44, 176 N.W.2d at 891-92.

154. *In re Carlisle Trust*, 498 N.W.2d 260 (Minn. Ct. App. 1993).

they died. His mother attended to his daily needs until 1979, when she was no longer available to do so, at which time Mr. Carlisle began receiving medical assistance benefits.<sup>155</sup>

In 1985, Mr. Carlisle's mother created a trust, with her son as the primary beneficiary, funded with approximately \$125,000 of her savings.<sup>156</sup> This trust, while drafted prior to the enactment of Minnesota's supplemental needs statute, was the functional equivalent of today's statutory supplemental needs trusts.<sup>157</sup> For example, the trustee was "to distribute sums from the trust for the benefit of [Mr. Carlisle] only for purposes of his entertainment, education, travel, comfort (including home improvement), convenience, and reasonable luxuries as the trustee, in its full discretion, deems advisable."<sup>158</sup> The trustee was further precluded from making any distributions for Mr. Carlisle's "food, shelter, clothing, medical care or other basic necessities as provided or to be provided by any governmental unit."<sup>159</sup> In addition, the trustee was required to "make distributions only to supplement and not to supplant such public assistance available for maintenance, health care or other benefits."<sup>160</sup> The trustee was not obligated to make distributions from the trust to Mr. Carlisle but, instead, had sole and absolute discretion to make distributions as he saw fit, "in light of the amounts available to [Mr. Carlisle] from sources other than the trust."<sup>161</sup>

Based upon this trust language, and upon the fact that the only distributions that Mr. Carlisle actually received from the trust were for the purchase of a specially equipped van, upkeep on his home, the purchase of a computer, an annual vacation, and occasional meals at a restaurant,<sup>162</sup> the court of appeals determined that the trust was not an "available asset" for medical assistance eligibility purposes.<sup>163</sup> *Carlisle*, therefore, confirms the validity and use of supplemental needs trusts in Minnesota.

c. *In re Kindt*

More recently, the Minnesota Court of Appeals held that a

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155. *Id.* at 262.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Carlisle Trust*, 498 N.W.2d at 262.

161. *Id.*

162. *Id.*

163. *Id.* at 266.

supplemental needs trust, the terms of which allowed the trustee unlimited distributionary discretion, was void as a matter of public policy and, thus, constituted an "available asset" for purposes of determining the disabled individual's medical assistance eligibility.<sup>164</sup> Because the "supplemental" character of the trust in *Kindt* did not expressly limit distributions to amounts which would continue to keep the disabled beneficiary eligible for medical assistance, the trust was not a valid supplemental needs trust.<sup>165</sup>

*C. Limits of Supplemental Needs Trusts and OBRA '93 Trusts*

Despite the many benefits of supplemental needs trusts, they are not the answer for everyone with a disability or with a disabled family member. Foremost in the minds of many individuals is the fact that there are severe restrictions imposed upon the manner in which trust assets may be expended.<sup>166</sup> For example, "money may not be spent for the benefit of others and thus the funds could not be used to pay for travel of family members to visit the beneficiary . . . or to pay for the college education or wedding of another child."<sup>167</sup> On a related note, beneficiaries of OBRA '93 trusts are unable to leave an inheritance to family members, unless the trust assets exceed the amount of medical assistance benefits that the state paid to the beneficiary.<sup>168</sup>

Because of these limitations, the possibility that the disabled individual might be able to procure private medical insurance that would cover the same services to be provided by public benefits should be considered prior to executing a supplemental needs trust. "Certainly a supplemental needs trust may not be appropriate for an individual, who, while seriously disabled, does not need extensive further care in contrast to one who requires extensive medical treatment," or where the administrative costs of maintaining the trust, including trustee fees, is prohibitive.<sup>169</sup> In other words,

a case-by-case analysis must be made in order to determine the utility of a supplemental needs trust. The greater the amount of public benefits necessary for plain-

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164. *In re Kindt*, 542 N.W.2d 391, 399 (Minn. Ct. App. 1996).

165. *See id.*

166. *See Kelner & Kelner, supra* note 72, at 3.

167. *Id.*

168. *See id.*

169. *Id.*

tiff's recovery and maintenance, the more beneficial the supplemental needs trust will be to plaintiff. Consequently, if a plaintiff anticipates receiving substantial public benefits during the course of his lifetime, a supplemental needs trust will provide a significant advantage. Conversely the receipt of a substantial recovery by a plaintiff requiring only nominal future public benefits may make a supplemental needs trust too restrictive and costly to be beneficial.<sup>170</sup>

It is also important to recognize the differences between OBRA '93 "payback trusts" and supplemental needs trusts. For example, only persons under age 65 with disabilities qualify for an OBRA '93 trust.<sup>171</sup> Consequently, an OBRA '93 trust

does not take the place of, or reduce, the need for families to leave a will with a [supplemental] needs trust for their son or daughter. It is, however, a wonderful safety net for those families who have failed to plan and have left their child an inheritance which otherwise would have resulted in the loss of Medicaid.<sup>172</sup>

Because most attorneys are not likely to be familiar with the intricacies of either OBRA '93 or the Minnesota supplemental needs trust statute, and because the punishment for proceeding erroneously, namely medical assistance ineligibility, is so egregious, individuals are strongly recommended to seek advice on these issues from attorneys who practice in this area and who are more likely to understand the issues in all their complexity.

#### *D. Miscellaneous Considerations for the Practitioner*

##### *1. Who is your Client?*

Knowing precisely who one's client is seems, particularly to persons outside the legal profession, to be a fundamental piece of information about which there is likely to be little confusion. In fact, this question is often quite difficult to answer, particularly in the field of estate planning. If an attorney is drafting a "subdivision 2" supplemental needs trust, for example, is her client the disabled individual?<sup>173</sup> Or are the parents or other family members who ac-

170. *Id.*

171. *See* Varnet, *supra* note 2, at 69.

172. *Id.*

173. *See* MINN. R. PROF. CONDUCT 1.14 (pertaining to the representation of clients under a disability).

tually retained the attorney, and who are likely paying the bill, the actual clients? What about the individuals or entities who are providing the actual assets to fund the trust? Many times each of these persons or entities will think the trust drafter is "their attorney," creating conflicts which could lead to disastrous consequences, not the least of which is some period of medical assistance ineligibility. In order to avoid such problems, estate planning attorneys must be absolutely sure they communicate in such a way as to make abundantly clear to all interested parties exactly whom the attorney is representing, and they should advise all other parties to retain separate counsel if they deem it advisable.<sup>174</sup>

## 2. *Who Should Be the Trustee?*

While it is axiomatic that every trust requires a trustee capable of managing the trust assets, the trustee of a supplemental needs trust has additional responsibilities and, thus,

must be chosen with care because a [supplemental] needs trust instrument grants the trustee great (often unlimited) discretion over the amount, timing and use of trust distributions. While many parents propose a sibling of the disabled child to be the trustee, this is often inappropriate. A sibling may lack financial expertise and would have a strong incentive not to make distributions if he or she is also a remainder beneficiary. It may be possible to avoid these problems by naming an institution and an individual as co-trustees, although multiple trustees could increase administrative costs.<sup>175</sup>

In other words,

The trustee must be willing and able to monitor the care the beneficiary receives and to devote the time necessary for understanding the child's needs and interests.

. . . .

Possibly of greater importance is a trustee that understands and keeps current with SSI and Medicaid regulations (or keeps in contact with an attorney experienced in public benefits) to avoid a reduction or interruption in benefits. For these reasons, parents who establish [a supplemental needs trust] will also usually serve as the trustee.

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174. See *id.* 1.7-1.9 (concerning conflicts of interest).

175. Lawrence A. Friedman, *Lifetime and Estate Planning for Persons with Developmental Disabilities or Mental Illness*, N.J. LAW., July 1995, at 40, 42.

tees in order to ensure that the special needs of their children are addressed.

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The disadvantages to using professional trustees are the expense for their services and the usual unwillingness of a professional to become involved in the personal care of a child with a disability.<sup>176</sup>

Even naming the disabled child's parents, who are establishing and funding the trust, as trustees is not without its hazards. In *DiGennaro v. Community Hospital of Glen Cove*, the proceeds of a medical malpractice lawsuit were to be placed in a supplemental needs trust, whereby the disabled child (by his parents) would irrevocably transfer his rights in the assets and would be named the primary income beneficiary of the trust, but no income would be paid to the child if it would deprive him of any governmental entitlement.<sup>177</sup> The court disapproved the trust, however, since the parents were both co-trustees and remainderpersons of the trust, creating a conflict which rendered the trust not in the child's best interest in the eyes of the court, particularly since the trust contained no provision for court approval of withdrawals from the trust and no requirement that the trustees account to the court on a regular basis.<sup>178</sup>

Selection of family members poses other difficulties besides conflicts of interest concerns. The trustee of a supplemental needs trust must be financially sophisticated enough to manage the trust effectively in order to maximize the trust assets and protect the disabled beneficiary.<sup>179</sup> Often family members simply do not possess a level of financial sophistication sufficient to do so. Such situations require the use of a trust company, which increases the management fees incurred by the trust.<sup>180</sup> If the option of retaining a pro-

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176. Moschella & Marcus, *supra* note 21, at C7.

177. 611 N.Y.S.2d 591, 592 (App. Div. 1994).

178. *Id.*

179. See Kelner & Kelner, *supra* note 72, at 3.

180. See *id.* In their article, Kelner and Kelner propose that if the funds for the trust are proceeds from a lawsuit, a structured settlement could be established in combination with the supplemental needs trust, which would provide for periodic, structured payouts to the trust. *Id.* Under this theory, Kelner and Kelner propose that either the defendant or the insurance company be the grantor of the trust. *Id.* This proposed solution, however, has a fundamental flaw. If an insurance company or defendant attempted to establish a proposed supplemental needs trust for the benefit of a disabled beneficiary, the trust would almost certainly disqualify the beneficiary from receiving medical assistance benefits, since



fessional trustee and a family member as co-trustees is financially prohibitive, a less expensive, yet acceptable, solution may be the use of a pooled asset trust.<sup>181</sup> Because many trusts are pooled into one, financial management fees are less, and consequently, administration costs are less. Furthermore, because any funds remaining in an individual trust after a beneficiary's death are added to the pooled trust, administration costs are lowered for all.<sup>182</sup>

In short, when contemplating the selection of a trustee for a supplemental needs trust, the following special considerations must be addressed:

1. The trustee must understand the purpose of the trust, as well as investigate and understand the applicable governmental benefit resources and their corresponding qualifications;
2. The trustee must understand the specific needs of the disabled child and possess the time and motivation to address those needs properly;
3. The trustee must possess the financial skill properly to manage, invest, and disburse the trust funds in light of all applicable regulatory provisions;
4. The trustee must be strong enough to resist manipulation by either the beneficiary, third parties, or government agencies, yet must also be wise enough to seek proper expert assistance when necessary;
5. Consider naming a bank, preferably one with experience administering supplemental needs trusts, as an alternate trustee if an individual trustee is selected;
6. In Minnesota, consider making reference in the trust instrument itself that it is the grantor's intention that the trust qualify as a supplemental needs trust for a person with a disability, pursuant to Minnesota Statutes, section 501B.89, subdivision 2, or, as the case may be, pursuant to 42 U.S.C. § 1396p(d)(4) and section 501B.89, subdivision 3, of Minnesota Statutes;
7. Require an individual other than the conservator

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OBRA '93 limits the individual who may establish a trust for the benefit of a disabled individual to close relatives, legal guardians, the court, and in the case of pooled asset trusts, the individual himself or herself. See Natalie J. Kaplan, Letter to the Editor, *Additional Comments on Needs Trusts Law*, N.Y. L.J., May 2, 1994, at 2 (citing 42 U.S.C. § 1396p(d)(4)).

181. See *supra* notes 79-91 and accompanying text.

182. See Moschella & Marcus, *supra* note 21, at C7.

or guardian of the disabled individual to serve as trustee, in order to avoid the potential arguments that the trust assets ought to be included under 42 U.S.C. § 1396p(e)(1) (1994); and

8. Consider who the remainder beneficiaries are, in order to avoid conflicts of interest which could render the trust void and the assets "available" for medical assistance purposes.<sup>183</sup>

### 3. *What Will Be the Duration of the Trust?*

While it is generally assumed that a supplemental needs trust will be in effect either until the death of the disabled beneficiary or the exhaustion of all trust assets, these are not the only points in time at which such a trust will terminate. For example, in *In re Sutton*, the disabled minor child had multiple physical disabilities, requiring extensive medical treatment paid for by Medicaid, but he had no mental disabilities.<sup>184</sup> When the child stood to inherit sums from his mother, his guardian petitioned the court to allow the funds to be placed into a supplemental needs trust, in order to avoid the inheritance's rapid dissipation.<sup>185</sup> The court ultimately allowed the establishment of the supplemental needs trust, *but only for so long as the disabled child was a minor*.<sup>186</sup> The court recognized the rather perplexing fact that it could not properly ask the child at the time of the hearing whether he wanted the supplemental needs trust to continue indefinitely because the child was a minor, but reasoned that when the child reached the age of majority, he would have the mental faculties to make such a decision on his own.<sup>187</sup> As such, the court ruled that the supplemental needs trust established at that time would automatically terminate when the child reached age 21, unless it had already been terminated by the child after he reached age 18.<sup>188</sup>

### 4. *Medicaid Liens*

In recent months, there has been a whirlwind of controversy

183. See Hochberg, *supra* note 1, at 94; see also Gunderson, *supra* note 3, at 2, 22 (outlining further recommendations for an acceptable trustee).

184. 641 N.Y.S.2d 515, 515 (App. Div. 1996).

185. *Id.*

186. *Id.* at 517.

187. *Id.*

188. *Id.*

surrounding the issue of whether preexisting Medicaid liens must be satisfied with proposed trust assets prior to the establishment of a supplemental needs trust. Until very recently, the consensus had been that supplemental needs trusts *could* be established prior to the satisfaction of a Medicaid lien, even under circumstances where the assets used to fund the proposed trust had been paid to the disabled individual prior to establishment of the trust and where the Medicaid expenses forming the basis for the lien were incurred prior to receipt of the assets.<sup>189</sup> In these situations, satisfaction of the Medicaid lien would simply be postponed until the death of the disabled trust beneficiary.<sup>190</sup>

It appears, however, that such is no longer the case, at least in certain situations, per the recently combined decision on the appeals of *Cricchio* and *Link*.<sup>191</sup> The New York Court of Appeals' decision focused in part on the fact that the plaintiffs, as a condition of Medicaid eligibility, agreed to assign to the Department of Social Services ("DSS") their rights to recover from any third parties who were responsible for their disabling injuries.<sup>192</sup> The court discussed the "recoupment" nature of Medicaid and SSI laws, stating:

Recoupment [of funds paid to the disabled individual by Medicaid] from responsible third parties is necessary to ensure that the Medicaid program remains the "payor of last resort."

. . . .

The recoupment of Medicaid funds from responsible third parties is accomplished by federal directives that the State Plan include assignment, enforcement and collection mechanisms. . . . Specifically, as a condition of eligi-

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189. See, e.g., *Klinger v. State*, 649 N.Y.S.2d 562 (App. Div. 1996) (concerning a plaintiff who was awarded a medical malpractice settlement); *Rosado v. Perez*, 648 N.Y.S.2d 938 (App. Div. 1996) (involving a plaintiff who was awarded damages in a personal injury case); *Link v. Town of Smithtown*, 640 N.Y.S.2d 768 (App. Div. 1996) (involving a plaintiff who recovered damages from a personal injury action); *Cricchio v. Pennisi*, 640 N.Y.S.2d 573 (App. Div. 1996) (concerning a plaintiff who recovered damages in a medical malpractice action); *Samerson v. Mather Mem'l Hosp.*, 632 N.Y.S.2d 948 (App. Div. 1995) (regarding a plaintiff who received a medical malpractice settlement).

190. See *Cricchio*, 640 N.Y.S.2d at 573 (citing 42 U.S.C. §1396p(d)(3)(B)(iii); directing such preexisting liens to be satisfied upon the beneficiary's death); *Samerson*, 632 N.Y.S.2d at 953 (holding that the lien, though postponed, was not vacated but deferred until the beneficiary's death).

191. *Cricchio v. Pennisi*, 1997 WL 138005 (N.Y. Mar. 25, 1997).

192. *Id.* at \*1.

bility, an applicant must assign to DSS any rights he or she has to seek reimbursement from any third party up to the amount of medical assistance paid. . . . Additionally, a Medicaid recipient must "cooperate with the State in identifying, and providing information to assist the State in pursuing, any third party who may be liable to pay for care and services under the plan," unless good cause exists for his or her refusal to cooperate . . . .

. . . .

Once the statutory notice and filing requirements are met, the public welfare official's lien attaches to any verdict, judgment or award in any suit respecting such injuries, 'as well as to the proceeds of any settlement thereof'. . . .<sup>193</sup>

The court stated that the fatal flaw in the plaintiffs' positions was the fact that the Medicaid liens did not actually attach to the property of the *plaintiffs*, in which case their theory may have had merit, but instead attached to the assets of the *responsible third parties*, over whom the plaintiffs had no control.<sup>194</sup> Nor did the liens in these cases attach to assets already in a trust, since the proceeds were part of a proposed settlement between the plaintiffs and the responsible third parties and were thus intended for, but not yet deposited in, the supplemental needs trust.<sup>195</sup>

The court went on to note, in an extremely far-reaching statement crucial to future determinations on this issue, that

[a]s a practical matter, the statutory assignment and lien provisions would be rendered meaningless if they remained unenforceable until the recipient's death. Plaintiffs fail to point out any legal mandate that would require the trustee to preserve trust assets at a level sufficient to satisfy the Medicaid lien upon that event. The trustee could easily deplete trust assets by spending them on worthwhile "quality of life" expenditures such as vacations and entertainment for the disabled beneficiary. The likelihood that many . . . liens may never be satisfied has the potential to thwart the twin goals of the Medicaid program – i.e., to obtain reimbursement from liable third parties and remain the payer of last resort.<sup>196</sup>

193. *Id.* at \*2-\*3 (citations omitted).

194. *Id.*

195. *Id.*

196. *Id.* at \*5. This ruling is also consistent with Minnesota law, which gives

Here the court seems actively to invite legislation or other regulations requiring a trustee, in the event that a supplemental needs trust is established prior to satisfaction of a Medicaid lien (i.e., those supplemental needs trusts established with funds other than those received from responsible third parties), to preserve the trust assets at a level sufficient to satisfy the Medicaid lien at the death of the disabled beneficiary. Finally, the court took "judicial notice of a Memorandum issued by the HCFA to all State Medicaid Directors which concludes that under the federal assignment mandates, DSS may seek reimbursement from third party settlement proceeds prior to their transfer to the individual recipient for placement in a Supplemental Needs Trust."<sup>197</sup>

In sum, the current state of the law in both the Minnesota and federal systems appears to be that Medicaid liens attached to the assets of third persons, which assets have been earmarked for establishment of a supplemental needs trust for a disabled individual, must be satisfied prior to the establishment of the supplemental needs trust. Moreover, the policy language in *Cricchio/Link*, along with the HCFA Memorandum, seem to foreshadow an extension of this position.

### 5. SSI Treatment of Supplemental Needs Trusts

Although Medicaid eligibility for elderly and disabled individuals typically mirrors SSI income and asset rules, this is not always the case. Trusts, for example, are one area where the Medicaid rules and the SSI rules differ.<sup>198</sup> Generally speaking, Medicaid eligibility requirements are more restrictive than SSI eligibility requirements where the use of trusts is concerned.<sup>199</sup> The SSI rules are discussed in considerable detail in the POMS, as discussed above.<sup>200</sup> Briefly stated,

SSI considers the beneficiary to be the "Grantor" of

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the state a lien upon the proceeds of an injured person's lawsuit award or settlement in an amount equal to the medical assistance benefits paid to the individual. See MINN. STAT. §§ 256.015, .042 (1996).

197. *Cricchio*, 1997 WL 138005, at \*5 n.6.

198. See Goldfarb & Stone, *supra* note 74, at 33; see also Patricia Tobin, *How the New SSI Trust Rules Can Clash With OBRA-93 (And What to do About It)*, ELDER L. REP., Oct. 1994.

199. See Goldfarb & Stone, *supra* note 74, at 33, 35 (comparing trust drafting challenges presented by Medicaid and SSI rules).

200. See *supra* notes 46-52 and accompanying text; see also Program Operations Manual System SI § 01120.200 (Mar. 1994).

the trust if the trust is set up by an agent or someone empowered to act on the beneficiary's behalf, with funds or property that belong to the beneficiary. Whether the funds of the "Grantor Trust" are a resource for SSI purposes depends on whether the beneficiary can revoke and use the assets of the trust. . . . Since the settlor and the primary beneficiary are the same person, the trust is considered "revocable" unless there is at least a "residual beneficiary" in the trust document who would receive funds at the beneficiary's death.

For SSI purposes, disbursements from the trust will be counted as income unless they are "in-kind" payments by the trustee to a third-party that result in the beneficiary receiving items which are not food, clothing or shelter. If the in-kind payments are for food, clothing or shelter, then SSI has presumed maximum value (PMV) rules, to calculate how much will be deemed as income and thus reduce the individual's SSI benefits. Income paid directly to the beneficiary will reduce benefits dollar for dollar.<sup>201</sup>

Accordingly, practitioners ought to ensure that when drafting supplemental needs trusts, they protect against consideration by SSI by including at least one residuary beneficiary and by providing for in-kind payments only.<sup>202</sup>

#### 6. *How Should the Trust Be Funded?*

There is an almost endless list of sources from which to fund a supplemental needs trust.<sup>203</sup> In addition to funding such a trust with Social Security back-payments or the proceeds of personal injury or malpractice litigation as discussed above, a disabled individual's relatives or friends may (and are presumably encouraged to) make gifts to the trust for the benefit of the individual. If such gifts are being made under a will or other testamentary document, the grantor must name the trust in the testamentary document, rather than the disabled beneficiary himself or herself, to avoid the gift being counted as an "available asset" for medical assistance eligibility purposes.<sup>204</sup>

Note that there is no requirement that the trust be initially es-

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201. Goldfarb & Stone, *supra* note 74, at 35.

202. *See id.*

203. *See* Gunderson, *supra* note 3, at 7-8.

204. *See* Moschella & Marcus, *supra* note 21, at C7.

established with funds sufficient to provide for the disabled individual's entire life, although it may not be a valid inter vivos trust until funded to at least some extent.<sup>205</sup> Persons can contribute funds to a supplemental needs trust after it has been established without fear of disqualifying the beneficiary from medical assistance eligibility.<sup>206</sup> Many parents use a supplemental needs trust as a "pour-over" vehicle, which will receive assets from their estates upon their deaths.<sup>207</sup> Additional options for funding the trust include making the trust a beneficiary of a life insurance policy or directing income from investments into the trust.<sup>208</sup>

### 7. *Tax Implications of Supplemental Needs Trusts*

If the size of an individual's or family's estate is sufficiently large, the establishment and/or maintenance of a supplemental needs trust or an OBRA '93 trust for the benefit of a disabled child or other family member may have far-reaching tax implications requiring the assistance of an attorney or financial advisor sophisticated in such matters. Specifically, consideration may need to be paid to estate tax, gift tax, and/or income tax issues, which could potentially alter the structure of an OBRA '93 or supplemental needs trust.<sup>209</sup>

## VI. CONCLUSION

In the past, disabled individuals and their families have had precious few alternatives for ensuring that the disabled individual received the governmental entitlements desperately necessary for his or her medical care while at the same time retaining a measure of assets sufficient to ensure that his or her "supplemental needs" are met as well. With the passage of OBRA '93 and the Minnesota supplemental needs trust statute, however, several options now exist for a variety of factual scenarios which meet both of the above goals while maintaining the dignity and quality of life of the disabled individual.

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205. See Gunderson, *supra* note 3, at 8.

206. See *id.*

207. See *id.* at 7.

208. See *id.* at 8.

209. See *id.* at 28-30.

## APPENDIX A

## SUPPLEMENTAL NEEDS TRUST AGREEMENT

This Trust Agreement, made and entered into this \_\_\_\_ day of \_\_\_\_\_, 199\_\_, by and between [NAME OF SETTLOR] of [COUNTY] County, Minnesota, "Settlor" and [NAME OF TRUSTEE] of [COUNTY] County, Minnesota (hereinafter referred to as "Trustee").

## WITNESSETH:

WHEREAS, the Settlor desires to establish an irrevocable supplemental needs trust for the benefit of [NAME/RELATIONSHIP] upon the conditions and for the purposes hereinafter set forth; and

WHEREAS, the Settlor has contemporaneously with the signing of this Agreement transferred certain property to the Trustee, a complete description of which is attached hereto and marked as "Exhibit A," the receipt of which said Trustee acknowledges; and

WHEREAS, the nature and severity of [NAME/RELATIONSHIP'S] disabilities will cause [HIM/HER] to require continuing support, assistance and supervision for the remainder of [HIS/HER] life, and it is anticipated that the funds provided to the Trustee herein will be insufficient to provide for such support, assistance and supervision; and

WHEREAS, it is the intention of the parties hereto to provide for a continuing conservation and enhancement of the funds provided to the Trustee to supplement, rather than supplant, all other financial and service benefits to which [NAME/RELATIONSHIP] might become eligible to receive as a result of [HIS/HER] disabilities from any local, county, state or federal agency, or through any public or private, profit or nonprofit corporations, entities, or agencies including, but not limited to, the State of Minnesota Department of Human Services or its successor agencies, or the United States Social Security Administration; and

WHEREAS, all matters relating to the administration and management of this Trust Agreement shall be interpreted in a manner consistent with these express intentions; and

WHEREAS, this Trust Agreement shall be limited in the appli-



cation of both income and principal of the Trust estate to provide benefits supplemental to those provided at the expense of the public or others, even if such application by the Trustee in [HIS/HER] discretion results in not providing general support, care or maintenance for [NAME/RELATIONSHIP];

NOW, THEREFORE, in consideration of the premises, it is hereby agreed by and between the parties hereto, that all property transferred or devised to the Trustee is to be administered and distributed by [HIM/HER] as provided in this Trust Agreement.

## ARTICLE ONE RESERVATION OF RIGHTS

- 1.0 Settlor reserves the following rights, to be exercised (except as otherwise specified) without the consent or participation of any other person:
  - 1.1 To add any other property acceptable to the Trustee, by transferring such property to the Trustee, which property shall be described in a receipt signed by the Trustee, and to add property by will. Additional assets or sums may be contributed to the initial Trust estate at any time by anyone. The Trustee shall administer and distribute such added assets as if they had been a part of the original Trust estate.
  - 1.2 To receive annually a written accounting of all trust transactions.
  - 1.3 To examine the records of any Trustee which relate to this Trust.

## ARTICLE TWO IRREVOCABILITY OF TRUST

- 2.0 This Trust Agreement shall be irrevocable. [NAME/RELATIONSHIP] shall have no right or power, whether alone or in conjunction with others, in whatever capacity, to alter, amend, revoke, or terminate this Trust Agreement, in whole or in part, or to designate the persons who shall possess or enjoy the Trust estate; provided, however, that the Trustee of this Trust Agreement may amend this Trust Agreement, with approval of the Court having jurisdiction over it, so that the Trust Agreement conforms with any rules or regulations

which are approved by any governing body or agency relating to 42 U.S.C. § 1396 or related statutes, including state statutes which are consistent with the provisions and purposes of the Omnibus Budget Reconciliation Act of 1993 and any amendments of such Act, so that this Trust Agreement conforms with any amendment to relevant state or federal laws. Such conforming amendments to this Trust Agreement shall be made and approved by the Court having jurisdiction over this Trust Agreement, with notice of such request for amendments being given to the Minnesota Department of Human Services.

### ARTICLE THREE USE AND DISPOSITION OF TRUST ASSETS

- 3.0 Purpose of Trust. This Trust is established as an irrevocable supplemental needs trust in accordance with Minn. Stat. § 501B.89, subd. 2 [or 42 U.S.C. § 1396, subd. 3; Minnesota Department of Human Services Instructional Bulletin No. 93-16M; and § 13611(b) of the Omnibus Budget Reconciliation Act of 1993, if applicable]. The Trustee shall pay to or apply for the benefit of [NAME/RELATIONSHIP], a person with a disability which existed prior to the date of this Trust Agreement, specifically [SPECIFY DISABILITY], which currently classifies [NAME/RELATIONSHIP] as a “disabled person” under Title II or XVI of the Social Security Act, for [HIS/HER] lifetime, subject to the conditions provided below, such amounts from the principal or income, up to the whole thereof, as the Trustee, in [HIS/HER] sole and absolute discretion, may from time to time deem necessary or advisable for the satisfaction of [NAME/RELATIONSHIP’S] supplemental or special needs. Any income not distributed shall be accumulated and added to principal. As used in this Trust, “supplemental” or “special needs” refers to [NAME/RELATIONSHIP’S] reasonable living expenses for maintaining [HIS/HER] good health, safety, and welfare when, in the discretion of the Trustee, such requisites are not being provided by any federal, state, county, or local public agency, office, or department of the state of Minnesota, or of any other state, or of the United States. “Supplemental” or “special needs” shall include but not be limited to, medical and dental expenses, insurance therefor, clothing and equip-

ment, travel, entertainment, programs of training, education, and treatment, vacations with relatives and friends, items for [HIS/HER] room, spending money, payments of premiums on life insurance on [HIS/HER] life, eyeglasses, and monetary requirements to enhance [HIS/HER] self-esteem, situation, and essential needs, any or all of which are not being provided by publicly-funded programs. It is the Settlor's desire that [HE/SHE] be provided with the possible items described above and the requisites which will foster [HIS/HER] improvement and encourage independent living.

3.1 During the life of [NAME/RELATIONSHIP]:

3.1.1 Accumulation of Income. The Trustee shall accumulate the entire net income of the trust and add the same to the principal.

3.1.2 Distribution of Principal. The Trustee shall expend such sums from the income and principal of the trust to or for the benefit of [NAME/RELATIONSHIP] only for purposes which supplement benefits from publicly-funded programs. Such expenditures may include, but are not necessarily limited to, entertainment, education, vacations and travel, comfort (including home improvement), convenience, and reasonable luxuries as the Trustee, in [HIS/HER] full and sole discretion, deems advisable. The Trustee may expend trust principal, if [NAME/RELATIONSHIP] becomes the owner of a home, to aid in the purchase of that home, and for home improvements, maintenance, or remodeling. The Trustee may also pay for special medical care, equipment, dental care, companion services, a private room, counseling, and treatment not covered by publicly-funded benefit programs, as well as legal, accounting, or other professional fees. All payments from this trust which do go to the benefit of [NAME/RELATIONSHIP] are to be direct payments to the person or persons who supply either goods or services

to [HIM/HER] at the request of the Trustee.

- 3.1.3 Restriction of Use of Trust Assets.** The Trustee shall not make any distributions for [NAME/RELATIONSHIP'S] food, shelter, clothing, medical care, or other basic necessities as provided or to be provided by any governmental unit, including the United States of America, State of Minnesota (and all other states) or any political subdivision thereof, or any governmental agencies, to the extent that such distributions would have the effect of replacing, reducing, or substituting for publicly-funded benefits otherwise available to [NAME/RELATIONSHIP] or rendering [HIM/HER] ineligible for publicly-funded benefits. The Trustee shall make distributions only to supplement and not to supplant such public assistance available for maintenance, health care, or other benefits. At no time shall any trust assets become available to [NAME/RELATIONSHIP] or be placed in [HIS/HER] possession.
- 3.1.4 Discretion of Trustee.** It is expressly understood that the Trustee is under no obligation to make any expenditures under this article, but if the Trustee, in [HIS/HER] sole discretion, decides to make any such expenditures hereunder, the Trustee shall under no circumstances pay or reimburse any sums to any governmental unit or governmental agency for any purpose, including the care, support, maintenance, and education of [NAME/RELATIONSHIP]. [NAME/RELATIONSHIP] shall have no interest in either the principal or income of this Trust Agreement. While this Trust Agreement is in existence, the assets of this Trust Agreement shall in no way be assignable or alienable by [HIM/HER] through any process whatsoever, and the assets of this Trust Agreement shall not be subject to garnishment, attachment, levy, or other legal

process of any Court from any creditors of [NAME/RELATIONSHIP], nor shall the assets of this Trust Agreement be an asset in any future bankruptcy of [NAME/RELATIONSHIP].

- 3.1.5 **Required Use of Other Sources.** In making any expenditure under this article, the Trustee is directed to consider the advisability of making such expenditure in light of the amounts available to [NAME/RELATIONSHIP] from sources other than the Trust. In connection therewith, the Trustee shall periodically review the benefits to which [NAME/RELATIONSHIP] shall be entitled from any such governmental unit or governmental agency including, but not limited to, Social Security Administration benefits, Veterans Administration benefits, Medicare benefits, Medical Assistance (Medicaid) benefits, and Supplemental Security Income (SSI) benefits, and the Trustee shall assist [NAME/RELATIONSHIP] in obtaining the same. The Trustee, however, shall not commingle the funds of the Trust with any amounts received from any such governmental unit or governmental agency or with any asset or earnings of [NAME/RELATIONSHIP]. It is recognized that the Trustee is not licensed or skilled in the field of social sciences. The Trustee shall seek the counsel and assistance of others, including any state or local agencies that are established to assist the disabled. The Trustee should use available resources to assist in identifying programs that may be of social, financial, developmental, or other assistance to [NAME/RELATIONSHIP]. The Trustee shall not, in any event, however, be liable to [HIM/HER] or any other party for acts undertaken as Trustee in good faith. The Trustee shall not be liable for failure to identify all programs or resources that may be available to [HIM/HER] because of [HIS/HER] disabilities.

3.1.6 This Trust shall terminate, and the entire remaining balance thereof shall be paid over and distributed by the Trustee as though [NAME/RELATIONSHIP] were then deceased, upon the first to occur of the following:

3.1.6.1 [NAME/RELATIONSHIP] becomes a patient or resident, after age 64, in a state institution or nursing facility for six months or more and, due to [HIS/HER] medical need for care in an institutional setting, there is no reasonable expectation that [NAME/RELATIONSHIP] will ever be discharged from the institution or nursing facility. For purposes of this paragraph, "reasonable expectation" means [NAME/RELATIONSHIP'S] attending physician has certified that the expectation is reasonable. For purposes of this paragraph, if [NAME/RELATIONSHIP] participates in a group residential program, [HE/SHE] is not deemed to be a patient or resident in a state institution or nursing facility.

3.1.6.2 A court of competent jurisdiction determines that the existence of the Trust renders [NAME/RELATIONSHIP] ineligible for benefits from any such governmental unit or governmental agency.

3.1.6.3 The Trustee, in [HIS/HER] sole and absolute discretion, determines that the Trust is or may be subject to garnishment, attachment, execution, or bankruptcy proceedings by a creditor of [NAME/RELATIONSHIP].

3.2 Upon the death of [NAME/RELATIONSHIP] the Trustee shall pay over and distribute the remaining balance of the trust as follows:

3.2.1 [NOTE: This paragraph to be used only if drafting a Subdivision 3 ("OBRA '93") trust.]  
The State of Minnesota shall receive all amounts remaining in the trust upon the death of [NAME/RELATIONSHIP], up to an amount equal to the total medical assistance benefits paid on behalf of [HIM/HER] under a state plan under 42 U.S.C. § 1396p(d)(4) or successor statute.

3.2.2 [SPECIFY REMAINDER PROVISIONS.]

#### ARTICLE FOUR TRUSTEE SELECTION

4.0 Trustees shall be appointed, removed, and replaced as follows:

- 4.1 Upon the disability or death of the Trustee, [NAME/RELATIONSHIP] shall be appointed as successor Trustee. [NOTE: Indicate whether successor Trustees must jointly exercise their duties.]
- 4.2 If an individual Trustee who is appointed Trustee under this article resigns, such individual Trustee may, by unanimous agreement of all other Trustees, appoint a successor individual Trustee.

#### ARTICLE FIVE FIDUCIARY PROVISIONS

5.0 The powers granted to the Trustee may be exercised during the term of any trust hereunder, and during such time after the termination of any such trust as is reasonably necessary to distribute the assets of the trust. All of the powers, except as hereinafter provided, are exercisable without any Court authorization or approval.

- 5.1 Discretionary Termination. The Trust hereby created shall terminate if the trust assets are so diminished that the Trustee shall determine that the continued administration thereof could be unduly burdensome or expensive to [NAME/RELATIONSHIP], and in such

event the assets of said Trust will be paid over and distributed to the person or persons then entitled to receive the net income of said Trust in the proportions in which they are entitled to receive said income.

- 5.2 **Restriction on Use of Trust Assets.** The Trustee shall not make any disbursements of the income or principal of this Trust that would have the effect of replacing, reducing, or substituting for publicly-funded benefits otherwise available to [NAME/RELATIONSHIP] or rendering [HIM/HER] ineligible for publicly-funded benefits. This Trust is created expressly for [NAME/RELATIONSHIP'S] extra and supplemental care, maintenance, support, and education in addition to and over and above the benefits [HE/SHE] otherwise receives or may receive as a result of [HIS/HER] disability from any local, state, or federal government, or from any other private agency, any of which provides service or benefits to persons with disabilities. It is the Settlor's express purpose that this Trust be used only to supplement or complement other benefits received by [HIM/HER].
- 5.3 **Trustee's Powers.** The Trustee is responsible for, and shall have the authority for, the financial management and investment of the Trust estate. The Trustee shall have the powers and authorities granted, or hereinafter granted, under the laws of the State of Minnesota including, but not limited to, the powers and authorities granted by the Minnesota Trustees' Powers Act, Minn. Stat. §§ 501B.79-.82, and specifically the powers described in Minn. Stat. § 501B.81, and all acts amendatory thereto, all of which powers and authorities are incorporated herein by reference, except as modified by this Trust Agreement. The Trustee shall also have the following specific powers:
  - 5.3.1 To retain, without liability for so doing, any property, real or personal, productive or unproductive, of whatsoever nature and wheresoever situated.
  - 5.3.2 To hold as assets of the Trust property other



than cash including, but not limited to, securities, real estate, and items of personal property.

- 5.3.3 To retain investments, so long as desirable, of all cash assets in a savings and loan or bank properly insured by the FDIC at the then-highest applicable interest rate.
- 5.3.4 To exercise the same powers with reference to stocks, bonds, or other investments as an individual owning the same could exercise including, but not limited to, the exercise or allowing to lapse of any subscription rights, the exercise of voting powers, the giving of general or specific proxies or powers of attorney with or without power of substitution, the participation in the consenting to reorganization, consolidations, mergers, and similar transactions, the making of deposits in any voting trust or with any protective or similar committee or with a Trustee or depository, and the payment of assessments.
- 5.3.5 To acquire, borrow, invest, rent, sell, exchange, convey, mortgage, lease, or otherwise transfer or dispose of stocks, bonds, and any and all other property, real, personal, or mixed, on terms and conditions as the Trustee may deem proper.
- 5.3.6 To compromise and settle all claims, including taxes, and to collect those in favor of the Trust and pay those accruing against it, and to maintain insurance against such hazards as the Trustee shall deem appropriate.
- 5.3.7 To determine what is principal or income of the Trust estate, to determine what receipts or expenditures shall apply to depreciation, waste, obsolescence, income and principal, to determine what expenses should be amortized, to arrange for suitable reserves for taxes or other expenditures which must be paid from time to time, and to include record of such determina-

tions in any accountings required by this Trust Agreement.

- 5.3.8 To make distributions of the principal of the Trust estate, in kind, and in accordance with paragraph 3.1.3 of this Trust Agreement, and to cause any share to be composed of cash, property, or undivided fractional shares in property different in kind from any other share.
- 5.3.9 To determine the value and composition of the several distributive shares upon termination of the Trust.
- 5.3.10 To appoint, in such a manner as the Trustee may determine, successor Trustees or executors, and to provide in writing, in such manner as the Trustee may determine, for succession and changes in the Trusteeships under this Trust.
- 5.3.11 To execute and deliver all deeds, tax returns, conveyances, assignments, leases, mortgages, and other instruments necessary or proper in the exercise of any power granted to the Trustee by this Trust, and to accept deeds of real property in satisfaction of bonds and mortgages and to make any payments in connection therewith which they may deem advisable.
- 5.3.12 It is the Settlor's intent, as expressed herein, that because [NAME/RELATIONSHIP] is a person with a disability, and is substantially impaired and is unable to care for, maintain and support [HIMSELF/HERSELF] independently, the Trustee shall seek, or ask that [NAME/RELATIONSHIP'S] guardian or conservator (as appropriate) seek support and maintenance for [HIM/HER] from all available resources including, but not limited to, Medical Assistance, Medicare, Supplemental Security Income (SSI), Minnesota Supplemental Income, Social Security Survivors and Disability Insur-

ance, or successor or similar programs. The Trustee shall take into consideration applicable resource and income limitations of any public assistance programs for which [HE/SHE] is eligible when determining whether or not to make any discretionary distributions. In carrying out the provisions of this Section, the Trustee shall be mindful of the probable future needs of the remaindermen of this Trust.

- 5.3.13 The Trustee shall have power to do all acts, institute all proceedings, and exercise all rights, powers, and privileges that an absolute owner of the trust property would have, subject always to the discharge of the Trustee's fiduciary obligations.
- 5.3.14 The enumeration of certain powers in this trust instrument shall not limit the general or implied powers of the Trustee. The Trustee shall have all additional powers that may now or hereafter be conferred upon the Trustee by law, including the Minnesota Trustees' Powers Act, or that may be necessary to enable the Trustee to administer this Trust in accordance with the provisions of this instrument subject to such limitations as may be expressly provided herein.
- 5.3.15 Should any provision of this Trust Agreement be or become invalid or unenforceable, the remaining provisions shall be and continue to be fully effective.
- 5.3.16 The Trustee shall have the power to construe this instrument and to determine in the first instance, except as otherwise provided herein, any question or dispute as to how the Settlor intends the trust to be administered, subject to review by a Court of competent jurisdiction.
- 5.3.17 The Trustee shall be free of any and all liability for acts done in good faith under the terms of this Trust Agreement and shall act without the

necessity of bond.

- 5.3.18 The Trustee is authorized to receive reasonable compensation for [HIS/HER] services hereunder in accordance with statutory standards under the conservatorship and trust laws of the State of Minnesota, and to pay all reasonable expenses, charges, and taxes of the trust deemed by the Trustee to be lawfully chargeable to the Trust estate, including reasonable expenses and attorneys' fees incurred in establishing the Trust.
- 5.3.19 To contest, settle, or compromise all tax matters, to elect to claim any expense of this trust as an income tax deduction or as an estate tax deduction, and to make any other elections authorized or permitted by law all without reimbursement or adjustment between principal and income or in favor of any beneficiary, even if the election directly affects the value of any beneficiary's share.
- 5.3.20 To employ agents, attorneys, investment counsel, appraisers, accountants, and others, even if they are associated with a Trustee, and to delegate both ministerial and discretionary powers and duties to such persons with liability only for reasonable care in their selection, and to place assets in an account with a trust department of a bank they select, under any agency or such other type of agreement, to rely on information and advice furnished by them without the duty of independent investigations, and to pay them reasonable compensation from the Trust.
- 5.3.21 To exercise every other power not specifically granted by this agreement that may be necessary to enable [HIM/HER] to create, continue, operate, expand, and change the form of any individual proprietorship, partnership, joint venture, corporation, or other business.
- 5.3.22 To accept additions from any source to the as-

sets of the Trust.

5.3.23 **Retention of Assets.** To continue to hold any property, including shares of stock of any Trustee under this Trust, real property used for residential or other purposes, and to operate at the risk of the Trust any business received or acquired under the Trust by the Trustee, as long as the Trustee shall deem advisable. If any real estate is used for homestead residential purposes for [NAME/RELATIONSHIP], [HE/SHE] shall have the unqualified right to reside in and occupy such property so long as [HE/SHE] (or [HIS/HER] guardian or conservator) shall wish to and it be appropriate for [HIM/HER] to do so.

5.3.24 To do any and all things which are incidental or necessary to the exercise of the powers and authorities herein conferred upon the Trustee. The enumeration of specific powers and authorities shall be deemed an extension and not a limitation of such powers and authorities.

5.4 **Required Use of Other Sources.** It is the Settlor's further intent that no part of the income or the principal of the Trust created herein shall be used to replace, reduce, or substitute for any public assistance benefits of any county, state, federal, or governmental agency or private organization which serves persons with disabilities which are the same or similar to the impairments of [NAME/RELATIONSHIP]. In the event the Trustee is requested by any department or agency to release principal or income of the Trust, to or on behalf of [NAME/RELATIONSHIP], to pay for special needs or other services which other organizations or agencies are authorized to provide, or in the event the Trustee is requested by any department or agency administering such benefits to petition the Court or any other administrative agency for the release of trust principal or income for this purpose, the Trustee shall deny such request and is directed to defend at the expense of the Trust estate any contest or other attack of

any nature of this section. The Trustee may only pay for the benefit of [NAME/RELATIONSHIP] that amount which does not exceed the state or federal regulations for maximum supplemental income.

## 5.5 Administrative Provisions.

5.5.1 Waiver of Bonds. No bond or other indemnity shall be required of any fiduciary nominated or appointed hereunder.

5.5.2 Waiver of Court Jurisdiction. Except where such Court jurisdiction is required, the Settlor expressly waives any request that the trust or trusts created by this Trust Agreement be submitted to the jurisdiction of any Court, that the Trustee be appointed or confirmed by any Court, and that the Trustee's accounts be heard and allowed by any Court. This provision, however, shall in no way prevent any of the beneficiaries hereunder or the Trustee from requesting any of the procedures waived in this article.

5.5.3 Trustee Appointment and Removal Procedures. To effect the appointment of a Trustee, the person entitled to make such appointment shall file with the Trustee to be appointed a written statement that such appointment is made. The appointment of a Trustee shall become effective upon receipt by the person entitled to make the appointment of the newly-appointed Trustee's written acceptance. A Trustee may be removed for cause, and a successor Trustee shall be appointed by the Court having jurisdiction over this Trust Agreement. To effect the removal of a Trustee, the person entitled to remove the Trustee shall either deliver to such Trustee a written statement that such removal is made, or mail such statement to such Trustee's last known business address by registered or certified mail. A removed Trustee shall cease to be a Trustee upon such

delivery or mailing and shall thereafter have no further duties, other than to account, and shall not be liable or responsible for the acts of any successor Trustee.

- 5.5.4 **Resignation Right.** Any Trustee shall have the right to resign at any time by application to the Court having jurisdiction over this Trust Agreement for leave to resign, for judicial settlement of the accounts, if necessary, and for appointment of a successor Trustee. The successor Trustee shall have the same powers and authorities herein conferred upon the resigning Trustee, unless otherwise provided in any Order from the Court appointing said successor Trustee. The successor Trustee shall be responsible only for the assets delivered by the Trustee, and may accept as correct the statement of the Trustee or [HIS/HER] legal representative that said statement constitutes all of the assets of the trust estate, without any duty to inquire into the administration or accounting by the Trustee. No successor Trustee shall be held responsible for any act or omission of a predecessor in trust. After the resignation becomes effective, the Trustee shall have no further duties, other than to account, and shall not be liable or responsible for the acts of any successor Trustee.
- 5.5.5 **Majority Vote and Delegation.** If more than one Trustee is serving, the Trustees' discretionary powers shall be exercised by a majority vote of the Trustees authorized to exercise such power, the power to exercise the discretion on behalf of the delegating Trustee.
- 5.5.6 **Custody of Assets.** If a corporate fiduciary is serving, it shall have custody of all assets, handle receipts and disbursements, and prepare accountings.
- 5.5.7 **Accounting.** [NOTE: TO BE USED IF

ACCOUNTINGS TO THE COURT ARE NECESSARY.] The Trustee shall make an annual statement of transactions and assets concerning all financial and investment activity undertaken on behalf of the Trust. A copy of said statement shall be delivered to the Court having jurisdiction over this Trust Agreement. The written approval of any such account, or the failure of the beneficiary, [HIS/HER] conservator, or the Court to object in writing within ninety (90) days after receipt of the account shall, as to all matters shown therein, be final and binding upon all persons who are then or thereafter may become entitled to share in the Trust.

## ARTICLE SIX GENERAL GOVERNING PROVISIONS

- 6.0 In applying the provisions of this document, the following shall govern:
- 6.1 Definitions.
- 6.1.1 "Descendants" means all persons who are lineally descended from the person whose descendants are referred to (including legally adopted lineal descendants), except illegitimate descendants and their descendants.
- 6.1.2 "Child" means a descendant of the first generation.
- 6.1.3 "Per stirpes" means in equal shares among living children of the person whose descendants are referred to and the descendants (taken collectively) of each deceased child of such person, with such deceased child's descendants taking by right of representation the share of such deceased child.
- 6.1.4 "Surviving" means a descendant in gestation at the time of an event, who is later born alive is "living" or "surviving" at the time of such event.



- 6.1.5 All reference to a person's surviving [NAME] means that if such person and [NAME] die under such circumstances that it cannot be established by sufficient evidence that they died otherwise than simultaneously, such person shall be deemed [NOT] to have survived [NAME].
- 6.1.6 "Fiduciary" means a Trustee of any trust hereunder, and may include individuals and corporations.
- 6.1.7 "Corporate fiduciary" means a qualified trust company or national or state banking institution having trust or fiduciary powers.
- 6.1.8 "Generation-skipping tax" means any state or federal tax imposed on a generation-skipping transfer.
- 6.1.9 Where appropriate, the masculine includes the feminine, the singular includes the plural, and vice versa.
- 6.2 Rules of Construction.
  - 6.2.1 Governing Law. The law of Minnesota, except as altered by this Trust Agreement, shall govern the meaning and legal effect of this Trust Agreement and the administration of this Trust. Except as otherwise provided, all references to applicable law and Minnesota statutes are to those in force on the date of this agreement and shall include any amendments and successor provisions, and references to the Internal Revenue Code shall mean the Internal Revenue Code of 1986, as amended. References to a particular section of the Internal Revenue Code shall include corresponding provisions of any subsequent federal tax law.
  - 6.2.2 Captions. Captions are for convenience and identification only, and are not intended to define, alter, limit, expand, or describe the scope or intent of any of the provisions of this document.

### 6.3 Protective Provisions.

- 6.3.1 **Fiduciary Liability Limited.** No fiduciary shall at any time be held liable for any action taken or not taken, or for any loss or depreciation in value of any property in any trust created hereby, or for any tax liability imposed on any trust beneficiary as a result of the accumulation or distribution of trust income or principal, whether due to an error of judgment or otherwise, if such Trustee has exercised good faith and ordinary diligence in the exercise of his or her duties. Further, each of the Trustees, under the above standard, shall be severally held to the faithful performance of his or her own acts, but, except in the case of bad faith, shall not be liable for the acts of any other Trustees.
- 6.3.2 **Spendthrift Provisions.** No interest in the principal or income of this Trust shall be anticipated, assigned, or encumbered, or shall be subject to any creditor's claim or to legal process, prior to its actual receipt by the beneficiary. Furthermore, it is the Settlor's intent as expressed herein that because this Trust is to be conserved and maintained primarily for the special needs of [NAME/RELATIONSHIP], who is a person with a disability, no part of the corpus thereof, nor principal nor undistributed income, shall be subject to the claims of voluntary or involuntary creditors for the provision of care and services, including residential care, by any public entity, officer, department, or agency of the State of Minnesota, or any other state, or of the United States, or any other governmental agency.
- 6.3.3 **Rule Against Perpetuities.** This Trust Agreement, if not sooner terminated pursuant to the provisions hereof, shall terminate twenty-one (21) years after the death of the survivor of the descendants of [NAME/RELATIONSHIP'S] grandparents who are living on the date of this

agreement. Any Trust assets governed by a statute or rule of law under which such assets could not validly remain in trust until that date shall be distributed on the last date on which such assets can validly remain in trust. In the event of termination of a trust in whole or in part under this provision, the assets shall be distributed to the person to whom income may be distributed.

- 6.3.4 A Court of competent jurisdiction shall have the continuing jurisdiction to modify any provision of this Trust to the extent necessary to maintain the eligibility of [NAME/RELATIONSHIP] for medical assistance or other public benefits under applicable law, taking into consideration the effective date of the establishment of this Trust.

The Settlor and Trustee approve of, and have signed this irrevocable Supplemental Needs Trust Agreement in duplicate on or as of the date appearing at the beginning of this agreement and verify that it correctly states the terms and conditions under which the trust property is to be held, managed, and disposed of by the Trustee, and the Trustee accepts [HIS/HER] appointment as Trustee and agrees by signing this agreement to administer and distribute the Trust estate as directed herein.

In the presence of:

\_\_\_\_\_  
Witness

\_\_\_\_\_  
[NAME OF SETTLOR], Settlor

\_\_\_\_\_  
Witness

\_\_\_\_\_  
Witness

\_\_\_\_\_  
[NAME OF TRUSTEE], Trustee

\_\_\_\_\_  
Witness

STATE OF MINNESOTA    )  
  ) ss.  
COUNTY OF \_\_\_\_\_ )

Subscribed, sworn to and acknowledged before me by [NAME OF SETTLOR] as Settlor and Trustee, this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
Notary Public

**“EXHIBIT A”****[NAME]  
SUPPLEMENTAL NEEDS TRUST AGREEMENT**

Dated \_\_\_\_\_, \_\_\_\_\_

**PRELIMINARY INVENTORY**

1. \_\_\_\_\_

\_\_\_\_\_  
[NAME OF SETTLOR]**ASSIGNMENT**

I hereby assign and transfer all of the assets listed above to  
[NAME OF TRUSTEE] as Trustee of the [NAME] SUPPLE-  
MENTAL NEEDS TRUST AGREEMENT dated \_\_\_\_\_,  
\_\_\_\_\_.

Dated: \_\_\_\_\_, \_\_\_\_\_.

Signed in the presence of:

\_\_\_\_\_  
Witness\_\_\_\_\_  
[NAME OF SETTLOR]\_\_\_\_\_  
Witness**RECEIPT**

Receipt of the above item(s) is hereby acknowledged.

\_\_\_\_\_  
[NAME OF TRUSTEE]

## APPENDIX B

### SUPPLEMENTAL NEEDS TRUST AGREEMENT

This TRUST AGREEMENT made this day of [MONTH], [YEAR], between [NAME], as Guardian of the property of [NAME], as "Grantor," and [NAME], as "Trustee," is established pursuant to an Order of the Supreme Court of the State of New York, [COUNTY] County. The "Grantor," [NAME], currently resides at [ADDRESS]. The "Trustee," [NAME], currently resides at [ADDRESS].

1.0 Trust Name: The Trust shall be known as the [NAME] Supplemental Needs Trust.

1.1 Purpose of Trust: The "Beneficiary" of the Trust is [NAME]. The purpose of the Trust is that the Trust's assets be used to supplement, not supplant, impair or diminish, any benefits or assistance of any federal, state, county, city, or other governmental entity for which the Beneficiary may otherwise be eligible or which the Beneficiary may be receiving. The Trust is intended to conform with New York State Estates Powers and Trusts Law (EPTL) 7-1.12.

1.2 Declaration of Irrevocability: The Trust shall be irrevocable and may not at any time be altered, amended, or revoked without Court approval.

1.3 EPTL 7-1.6: EPTL 7-1.6 or any successor statute, or any similar statute of any jurisdiction, shall not be applied by any court having jurisdiction of an inter vivos or testamentary trust to compel, against the Trustee's discretion, the payment or application of the trust principal to or for the benefit of [BENEFICIARY], or any beneficiary for any reason whatsoever.

2.0 Administration of Trust During Lifetime of Beneficiary: The property shall be held in trust for the Beneficiary, and the Trustee shall collect income and, after deducting all charges and expenses attributed thereto, shall apply for the benefit of the Beneficiary, so much of the income and principal [even to the extent of the whole] as the Trustee deems advisable in his sole and absolute discretion subject to the limitations set forth below. The Trustee shall add the balance of net income not paid or applied to the

principal of the Trust.

2.1 Consistent with the Trust's purpose, before expending any amounts from the net income and/or principal of this Trust, the Trustee shall consider the availability of all benefits from government or private assistance programs for which the beneficiary may be eligible. The Trustee, where appropriate and to the extent possible, shall endeavor to maximize the collection and facilitate the distribution of these benefits for the benefit of the Beneficiary.

2.2 None of the income or principal of this Trust shall be applied in such a manner as to supplant, impair, or diminish any governmental benefits or assistance for which the Beneficiary may be eligible or which the Beneficiary may be receiving.

2.3 The Beneficiary does not have the power to assign, encumber, direct, distribute, or authorize distributions from this Trust.

2.4 Notwithstanding the above provisions, the Trustee may make distributions to meet the Beneficiary's need for food, clothing, shelter, health care, or other personal needs, even if those distributions will impair or diminish the Beneficiary's receipt or eligibility for government benefits or assistance only if the Trustee determines that the distributions will better meet the Beneficiary's needs, and it is in the Beneficiary's best interests, notwithstanding the consequent effect on the Beneficiary's eligibility for, or receipt of, benefits.

2.5 However, if the mere existence of this authority to make distributions will result in a reduction or loss of the Beneficiary's entitlement program benefits, regardless of whether the Trustee actually exercises this discretion, the preceding paragraph (2.4) shall be null and void and the Trustee's authority to make these distributions shall terminate and the Trustee's authority to make distributions shall be limited to purchasing supplemental goods and services in a manner that will not adversely affect the Beneficiary's government benefits.

2.6 Additional to Income and Principal: With the Trustee's consent, any person may, at any time, from time to time, by court order, assignment, gift, transfer, deed, or will, provide income or add to the principal of the Trust created herein, and any property so added shall be held, administered, and distributed under the terms of this Trust. The Trustee shall execute documents neces-

sary to accept additional contributions to the Trust and shall designate the additions on an amended Schedule A of this Trust.

**3.0 Disposition of Trust on Death of Beneficiary:** The Trust shall terminate upon the death of [BENEFICIARY] and the Trustee shall distribute any principal and accumulated interest that then remains in the Trust as follows:

**3.1** The New York State Department of Social Services, or other appropriate Medicaid entity within New York State shall be reimbursed for the total Medical Assistance provided to [BENEFICIARY] during his lifetime, as consistent with federal and state law. If [BENEFICIARY] received Medicaid in more than one state, then the amount distributed to each state shall be based on each state's proportionate share of the total amount of Medicaid benefits paid by all states on the behalf of the Beneficiary.

**3.2** All remaining principal and accumulated income shall be paid to the legal representative of the Beneficiary.

**4.0 Trustee:** [NAME] is appointed Trustee of this Trust. If, for any reason, [TRUSTEE] is unable to or unwilling to serve as Trustee, then [NAME] shall serve as Successor Trustee, subject to the approval of the Supreme Court, [COUNTY] County.

**4.1 Consent of Trustee:** A Trustee shall file with the Clerk of the Court, [COUNTY] County, a "Consent to Act" as Trustee, Oath and Designation, duly acknowledged.

**4.2 Bond:** The Trustee shall be required to execute and file a bond and comply with all applicable law, as determined by the Supreme Court, [COUNTY] County.

**4.3 Resignation:** A Trustee may resign by giving written notice, a signed and acknowledged instrument, delivered to (i) the Supreme Court, [COUNTY] County; (ii) the Guardian of the Beneficiary, if any; and (iii) the Beneficiary. The Trustee's resignation is subject to approval of the Supreme Court, [COUNTY] County.

**4.4 Discharge and Final Accounting of Trustee:** No Trustee shall be discharged and released from office and bond, except upon filing a Final Accounting in the form and manner required in section 81.33 of the Mental Hygiene Law and obtaining judicial approval of same.



4.5 Annual Accounting: The Trustee shall file during the month of May of the Office of the Clerk of the County of [CNTY], an annual report in the form and manner required by section 81.31 of the Mental Hygiene Law.

4.6 Continuing Jurisdiction: The Court shall have continuing jurisdiction over the performance of the duties of Trustee, the interpretation, administration, and operation of this Trust, the appointment of a successor Trustee and all other related matters.

4.7 Powers of Trustee: In addition to any powers which may be conferred upon the Trustee under the law of the State of New York in effect during the life of this Trust, the Trustee shall have all those discretionary powers mentioned in EPTL 11-1.1 *et seq.*, or any successor statute or statutes governing the discretion of a Trustee, so as to confer upon the Trustee the broadest possible powers available for the management of the Trust assets. In the event that the Trustee wishes to exercise powers beyond the express and implied powers of EPTL article 11, the Trustee shall seek and must obtain judicial approval.

4.8 Appointment of a Successor Trustee: Appointment of a Successor Trustee not named in this Trust shall be upon application to the Court.

4.9 Compensation of Trustee: A Trustee shall be entitled to such compensation as may be allowable under the laws of the State of New York. In addition, the Trustee shall be entitled to be reimbursed for reasonable expenses incurred by the Trustee in the administration of this Trust.

## 5.0 Miscellaneous Provisions

5.1 Governing Law: This Trust Agreement shall be interpreted and the administration of the Trust shall be governed by the laws of the State of New York; provided, however, that federal law shall govern any matter alluded to herein which shall relate to or involve government entitlements such as SSI, Medicaid, and/or other federal benefit programs.

5.2 Notifications to Social Services District: The Trustee shall provide the required notification to the Social Services District in accordance with the requirements of section 360-4.5 of Title 18 of the Official Regulations of the State Department of Social Services, and any other applicable statutes or regulations, as they

may be amended. These regulations currently require notification of the creation or funding of the trust; notification of the death of the beneficiary; and in the case of trusts exceeding \$100,000, notification in advance of transactions that substantially deplete the trust principal (as defined in that section).

5.3 Savings clause: If it is determined that any provision hereof shall in any way violate any applicable law, such determination shall not impair the validity of the remaining provisions of the Trust.

5.4 Usage: In construing this Trust, feminine or neutral pronouns shall be substituted for those of the masculine form and vice versa, and the plural for the singular and vice versa in any case in which the context may require.

5.5 Headings: Any headings or captions in the Trust are for reference only, and shall not expand, limit, change, or affect the meaning of any provision of the Trust.

5.6 Binding Effect: This Trust shall be binding upon the estate, executors, administrators, and assigns of the Grantor, and any individual Trustee, and upon any Successor Trustee.

IN WITNESS WHEREOF, the undersigned have executed this Agreement as of the day and year first above written.

Dated: \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_

GRANTOR:

\_\_\_\_\_  
[NAME], as Guardian of the Property of [NAME]

Dated: \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_

TRUSTEE:

\_\_\_\_\_  
[TRUSTEE]

STATE OF NEW YORK    )  
  ) ss.  
COUNTY OF \_\_\_\_\_ )

On this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, before me personally came [GRANTOR], to me known and known to be to be the individual described in and who executed the foregoing Trust Agreement and duly acknowledged to me that s/he executed the same.

\_\_\_\_\_  
Notary Public

On this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, before me personally came [Trustee], to me known and known to me to be the individual described in and who executed the foregoing Trust Agreement and duly acknowledged to me that s/he executed the same.

\_\_\_\_\_  
Notary Public

### SCHEDULE "A" TO SUPPLEMENTAL NEEDS TRUST